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Supreme Court of the United States

October Term, 1938

No. 676

HORTON C. RORICK,

Petitioner,

vs.

DEVON SYNDICATE, LIMITED, A CANADIAN CORPORATION,

Respondent.

On Certiorari from United States Circuit Court of Appeals, Sixth Circuit

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RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

This case is one in which all questions but one are either questions of local Ohio law or questions of fact. The one federal question involved is whether in a removal case *in which the state court has acquired no jurisdiction of either the person or the property of the defendant,* a valid attachment may issue out of the federal

court *without any personal service of summons being had upon the defendant.* Even this federal question is not clearly presented in the case or necessary to its decision, as there are fatal defects under Ohio law in the attempted attachment proceedings in the federal court which would invalidate such proceedings, even if that court *had* power to issue an attachment on proper proceedings without personal service upon the defendant.

Under the circumstances it will be necessary for us to devote much the greater part of this brief to a discussion of questions of purely Ohio law. The federal question does not arise at all unless it be first held that *all* of our contentions and the holdings of both lower courts as to fact and law under Ohio statutes are wrong.

STATEMENT OF THE CASE

We find it necessary to supplement and in some respects correct petitioner's statement of the case.

Petitioner on June 19, 1930, filed as plaintiff in the Court of Common Pleas of Lucas County, Ohio, a petition in which he named as defendants Devon Syndicate, Ltd., and Paris Singer.

Also, on the same day, petitioner filed in said court an "Affidavit in Attachment and Garnishment," in which he alleged that both the defendants were non-residents and that neither could be served with summons in the State of Ohio.

The above mentioned affidavit did not conform to the state law in numerous respects hereinafter set forth under the caption "Argument."

On the same day the petition was filed, a summons

was issued for the defendants, which the sheriff returned, not found, on June 30. (R. 8.)

Also on June 19, 1930, the clerk issued an order of attachment directed to the sheriff, and on the same date issued to the sheriff a separate paper entitled "Notice to Garnishee."

On June 23, 1930, the sheriff made a return of the order of attachment (R. 9), "no money made, not satisfied."

On the 30th day of June, 1930, the sheriff filed the "Notice to Garnishee" with the clerk, with a "return" that he had delivered copies of it to the several garnishees. (R. 11.)

On June 27, 1930, petitioner filed another "Affidavit in Attachment and Garnishment" with the clerk, which was also defective under Ohio law as hereinafter pointed out. Endorsed on this affidavit was a praecipe directing the clerk to issue "Notice to Garnishee" to certain additional persons (R. 12), which was issued the same day. *No order of attachment was requested and none was issued by the state court after the filing of this second affidavit.* The sheriff on July 3, 1930, filed the second Notice to Garnishee with the clerk, with a "return" that he had delivered the notice to the additional garnishees.

Nothing further was done in the case until October 10, 1930, when petitioner filed in the state court an "Affidavit for Constructive Service" (R. 15), alleging the non-residence of Singer and of Devon Syndicate, Ltd., that neither of the defendants could be served in the State of Ohio, and that the action was one in attachment and garnishment and a proper one for service by publication. Notice to the defendants (R. 16) was thereupon

published and proof of publication was filed October 11, 1930. (R. 17.) *The notice was fatally defective in that it did not advise defendants of the object of the action, as no mention was made in it that any proceedings in attachment or garnishment had been commenced.*

On December 5, 1930, the defendants, appearing specially, filed their petition, bond and motion for removal of the cause to the United States District Court, and on that day an order of removal was entered (R. 17-24). On January 15, 1931, The Spitzer Rorick Trust & Savings Bank, one of the garnishees, filed an answer in the District Court, alleging that it was indebted to and held certain property of the defendant Devon Syndicate, Ltd.

On January 26, 1931, the defendant Devon Syndicate, Ltd., appearing specially, filed a motion (R. 26-28) for an order quashing the pretended service of summons upon it by publication, and dismissing the pretended attachments and garnishments of its property for various reasons which are discussed in the argument herein.

Nothing further was done in the case until February 17, 1936, when upon leave of the District Court petitioner filed an Amended and Supplemental Petition in that court. (R. 29.)

Also on February 17, 1936, petitioner filed in the District Court a paper entitled "Supplemental Affidavit in Garnishment." *The attachment proceedings thus attempted to be begun were fatally defective under the law of Ohio,* as is pointed out in the argument herein. On February 17, 1936, *prior to the issuance of any summons by the District Court and prior to the beginning of any publication of notice to defendants,* an order of

attachment was issued by the District Court to the marshal, and on February 26, 1936, the marshal made a return of this order (R. 36-37). Notices to Garnishees were also issued to the marshal on February 17, 1936 (R. 38-42).

The present record does not show that any notice to defendants was published after the removal of the cause to the District Court. We are willing to stipulate, however, that in fact a new notice was published, if petitioner will admit, what is the fact, that the proof of publication shows that the first publication in the District Court was on February 19, 1936, and hence *after* the issuance February 17, 1936 (R. 37), and service, February 18, 1936 (R. 36), of the order of attachment in the District Court and that the notice was in the form set forth in Appendix A to this brief.

No summons was issued in the District Court for the defendants until April 4, 1936 (R. 86). The marshal returned this "Not found" on April 6, 1936 (R. 86).

On April 11, 1936, respondent, still appearing specially, moved the court for an order quashing the pretended service by publication on the plaintiff's Supplemental and Amended Petition and dismissing the pretended attachment and garnishment under the supplemental affidavit in garnishment, for varions reasons (R. 43), which are discussed in the argument in this brief.

Thereafter, on June 8, 1936, respondent's several motions to quash were submitted to the District Court on affidavits (R. 66-84), oral evidence and certain stipulations (R. 61-64), and on June 11, 1936, the District Court entered its judgment (R. 50-51).

In its judgment entry the court found:

> "* * * that the notary, to-wit, D. W. Drennan, before whom the affidavits in attachment and garnishment dated June 19th and June 27, 1930, respectively, and each of them, were sworn, was not a proper person to act as notary on such affidavits, or either of them, and that such affidavits, and each of them, were void and of no effect."

The court further found that the attempt to attach and garnishee in the District Court

> "was void and ineffective for the reason that no personal service had been obtained upon the defendant, Devon Syndicate, Limited, nor the defendant, Paris E. Singer."

The court found it

> "unnecessary for it to pass upon the other grounds raised by Devon Syndicate, Ltd., for the granting of its motions."

The court granted the motions to quash, and, as shown by its entry:

> "* * * being advised by plaintiff's counsel that the plaintiff desires no further time or opportunity to attempt to obtain personal service of process herein on the defendant Devon Syndicate, Limited, it is further ordered that the attachment and garnishment herein be discharged and that plaintiff's petition and amended supplemental petition be stricken from the files of this court at plaintiff's costs." (R. 51.)

Upon appeal to the Circuit Court of Appeals by petitioner, that court found it unnecessary to pass upon any of the grounds of respondent's motions to quash other than the ground that the attachment had been issued before and not at or after the commencement of

the action in the state court, and that being void for that reason, the District Court after removal had no jurisdiction to issue a new attachment without personal service of summons.

The Circuit Court of Appeals did not pass upon a motion to dismiss the appeal filed by respondent, the grounds of which are hereinafter stated and discussed.

The argument herein will discuss the defects in petitioner's proceedings in the order in which they occurred.

ARGUMENT

I

(1) THE AFFIDAVIT FOR ATTACHMENT IN THE STATE COURT WAS FATALLY DEFECTIVE:

(a) The Affidavit for Attachment Did Not State That Affiant "Does Believe" and Did Not Describe Any Property of the Defendant.

In Ohio the provisional remedy of attachment is an extraordinary remedy in derogation of the common law, having its origin solely in statutory law and being in the nature of "an execution in advance" levied in anticipation of the establishment of the claims of the plaintiff in the main action.

James Ward & Company vs. Howard, 12 O. S. 158, 162;
Rempe vs. Ravens, 68 O. S. 113, 128;
Green vs. Coit, 81 O. S. 280, 285.

The order of attachment is issued by the Clerk of the Court as a matter of course upon the tendering of an

affidavit containing the requisite allegations and disclosing the requisite information (Section 11820 O. G. C.). In view of the extraordinary nature of this *ex parte* remedy which thus permits anticipatory execution upon the property of a defendant who is not in court, and who has no actual notice or opportunity to be heard in advance of the issuance of the writ, and which, under some circumstances, even permits the property thus seized to be actually sold in advance of the determination of the rights of the parties (Section 11843 O. G. C.), it is necessarily of particularly great importance that plaintiffs, seeking to avail themselves of such remedy, shall be required to comply precisely and strictly with the applicable statutory requirements requisite to the invocation of the remedy.

Colwell vs. Bank, 2 Ohio 228;
Taylor vs. McDonald, 4 Ohio 149;
Gury vs. Tannenwald, 18 Ohio 481, 487;
Miller vs. Veldhuyzon, 13 O. N. P. (N.S.) 546;
Mead vs. Rice, 19 O. N. P. (N.S.) 173;
Coal & Coke Company vs. Pocahontas, 17 O. D. 151, 152.

The pertinent portion of Ohio General Code Section 11828, provides as follows:

> "When the plaintiff * * * makes oath in writing that he has good reason to believe, *and does believe*, that any person * * * in the affidavit *named*, has property of the defendant in his possession, *describing it*, if the officer cannot get possession * * * *he must leave with such garnishee a copy of the order* of attachment, with a written notice that he appear in court and answer, as hereinafter provided. * * *" (Italics ours.)

Thus, in Ohio, a sworn affidavit is a mandatory jurisdictional prerequisite to a valid issuance of an order of attachment. The statute (Section 11828) definitely prescribes the form and contents of such affidavit. Plaintiff must state under oath "that he has good reason to believe, *and does believe*" etc., *and must describe the property sought to be attached.*

In this case two affidavits were filed by plaintiff in the Court of Common Pleas (R. 6 and 12) as the basis for the orders of attachment issued in that court. Although both affidavits were defective in the respects hereinafter mentioned we are concerned only with the affidavit first filed (R. 6) as no order of attachment was issued upon the second affidavit (R. 12). *The petitioner's statement to the contrary on page 2 of the petition for certiorari and on page 2 of his brief herein is erroneous.* We therefore confine our discussion to the affidavit first filed.

That affidavit was fatally defective for failure to comply with Section 11,828, in that it merely stated:

> "Affiant further says that he has good reason to believe that" etc.

At no place in the affidavit does the plaintiff allege that he "does believe" that the named garnishees "have property of the defendant in his possession," nor is there any description of any property of the defendant claimed to be in the possession of the garnishees as affirmatively and specifically provided by Section 11828. The words "moneys, property and assets" found in the affidavit clearly do not comply with the mandate of Section 11828, that plaintiff's affidavits shall *describe* the property.

In practice, the foregoing provisions of the statute have been uniformly regarded in Ohio as mandatory prerequisites to any valid affidavit upon which an order of attachment may be properly predicated, and on such few occasions as the courts have been called upon to formally pass upon the effect of an attempted departure from such practice, they have uniformly held non-complying affidavits to be insufficient and void. It is not the fact that the provisions of Section 11828 are for the benefit of the garnishee and not of the defendant. None of the cases cited on page 32 of petitioner's brief so holds.

In the unreported case of *The Spitzer Rorick Trust & Savings Bank vs. Thompson*, No. 123,017 on the docket of the Common Pleas Court of Lucas County, Ohio, the bank (one of the companies controlled by the petitioner in the present case) was represented by the same attorneys who represent the petitioner in this court and who represented the petitioner as plaintiff in the courts below. The affidavit in attachment in the *Thompson* case was attacked on motion on the same ground that defendant has raised in the instant case, namely, that there was no allegation that affiant "believed" that the garnishee had property of the defendants. The matter was fully briefed and orally argued to the court, following which the motion to quash the attachment was granted. The journal entry of the court provided in part that:

> "This day this cause came on for hearing, on the motion of the defendants * * *, to quash the constructive service upon said defendants and to dissolve the attachment issued herein and discharge the garnishees * * *, and the court, on due consideration, finds that said motion should

be granted and grants the same for the *sole reason* that *the affidavit* in attachment and garnishment herein is defective in that it *fails to state that affiant believes* the garnishees have property of defendants in their possession. * * * To all of the foregoing plaintiff excepts." (Italics ours.)

See also the decision of the late Judge Westenhaver in *Sandusky Cement Company vs. Hamilton & Company*, 273 Fed. 596, 598 *et seq.* (Ohio), in which the court recognizes that Section 11828 makes mandatory an affidavit containing a positive allegation that the plaintiff "does believe."

Likewise it has been held, in construing the analogous Section 11820, that the affidavit is fatally defective if it fails to state that the action was founded on contract or judgment (*Pope vs. Hibernia Insurance Company*, 24 O. S. 481); or if it fails to allege that the claim sued upon is just, or fails to state the amount which affiant believes he ought to recover (*Endel vs. Leibrock*, 33 O. S. 254; *Cook vs. Olds Gasoline Engine Works*, 19 O. C. C. 732); or if it fails to set forth the nature of plaintiff's claim (*Driscoll vs. Kelly*, 5 O. N. P. 243); or fails to state when the claim will become due (*Mansfield Savings Bank vs. Post*, 22 O. C. C. 644); or fails to negative the exception in favor of foreign corporations found in Section 11819 (*Dillon vs. Carlisle Garment Company*, 5 App. 347); or fails to positively allege the fact of defendants' non-residence, merely alleging affiant's belief in that regard (*Edwards Manufacturing Company vs. Ashland Sheet Mill Company*, 11 O. C. C. (N.S.) 479).

Thus, it is the settled law of Ohio that the form and contents of the affidavit, pursuant to which the order of

attachment is issued, must comply with the provisions of the statute pursuant to which the affidavit is filed. Hence, the affidavit in this case is fatally defective, not only for failing to comply with the statutory requirement of an allegation that plaintiff "does believe," but also for failing to comply with the statutory provision requiring that the affidavit *describe the property* sought to be attached.

It is indisputably established in Ohio that if the affidavit is improper, incomplete or insufficient, any writ of attachment based thereon is a nullity and void (*Endel vs. Leilrock*, 33 O. S. 254; *Pope vs. Hibernia Insurance Co.*, 24 O. S. 481).

As is said by the Supreme Court of Ohio in *Leavitt vs. Rosenberg*, 83 O. S. 230:

> "* * * The proceedings in attachment are statutory remedies, and it is too well settled to need the citation of authorities that where a statute confers a right or gives a remedy unknown to the common law that the party asserting the right, or availing himself of the remedy, must in his pleadings bring himself or his case, clearly within the statute. * * *" (P. 239.)

Clearly it is no answer to such authorities as these to say, as petitioner does at pages 28 to 31 of his brief, that the attachment statutes are remedial and are to be liberally construed. This means that substantial *compliance* is sufficient, not that the plain provisions of the statutes may be disregarded or deliberately flouted as in this case.

We submit that the affidavits filed in the State Court were fatally defective by reason of their failure to comply with the statutes requiring the affiant to state that "he does believe" and requiring the affidavit to con-

tain the description of the property sought to be attached, and hence the attempted proceedings in the State Court were null and void.

(b) The Affidavit for Attachment Was Verified Before a Notary Who Was an Employee and Attorney of the Petitioner (a Banker and Broker), and Hence Not Qualified to Act as Such.

There are two provisions of the Ohio statutes which are applicable, and under each of them the notary before whom respondent swore to the affidavit of attachment was disqualified to act. One of these provisions is found in Section 11524, O. G. C., which in turn refers to Section 11532, O. G. C. These sections are as follows:

> *11524*: "An affidavit may be made in * * * this state before any person authorized to take depositions. * * *."
>
> *11532*: "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

Under these two sections it, therefore, appears that the question is, "Was the notary qualified to preside at the taking of depositions in this case?" If he was not qualified to preside at the taking of depositions, then he was not qualified to take petitioner's affidavit. This question, in turn, depends upon the questions, was he an attorney of the petitioner, or was he "otherwise interested in the event of the action *or proceeding*," if depositions were taken?

It appears in the testimony of the notary, D. W. Drennan, that he was a member of the bar of Ohio and

of the Federal District, and that since his admission to practice in 1916, he had been employed by a partnership in which plaintiff was a partner, or by its successor corporation, of which plaintiff was president. He testified (R. p. 64), "I handle some private practice on my own in addition to my work with Spitzer-Rorick & Company *and Mr. Rorick* * * *. I do some work for the Spitzer Rorick Trust & Savings Bank * * *. *My principal occupation is in the office of Spitzer Rorick, Inc., or Spitzer Rorick & Company, its predecessor.*" He said he had appeared in court for Spitzer Rorick & Company. Thus it appears that he was an "attorney of the plaintiff," although he was not his attorney in this particular case. It also appears that if he had attempted to act as the presiding magistrate at the taking of depositions in this case, that he would have been interested "in the event of the proceeding," for as such presiding magistrate it would have been his duty to "pass upon the witness' privilege," *Bevan vs. Krieger*, 289 U. S. 459, 464, if the witness claimed that certain testimony was privileged, and "to pass in the first instance upon the propriety of a witness' refusal to answer." *Bevan vs. Krieger*, page 464. If Drennan's employer, the petitioner herein, or any other person, had been a witness upon the taking of such depositions and had refused to testify or produce certain papers, it would have been Drennan's duty to decide in the first instance whether or not such witness should be required to produce such papers or give such testimony, and if he ordered him to answer or to produce and the witness refused, then it would have rested with Mr. Drennan to determine whether or not he would order the witness committed for contempt. Obviously,

Mr. Drennan in such case would have been interested in the event of the proceeding, for if he had committed his employer to jail for contempt, or forced any other witness to answer over his employer's objection, he might reasonably have anticipated that the result would have been his discharge from his general employment by Mr. Rorick and Mr. Rorick's companies. It would, we submit, be a very careless and overly trustful lawyer who would entrust to a notary who was entirely dependent upon the opposing party for his livelihood the question as to whether such party or his witnesses should be compelled by contempt proceedings to answer questions or produce papers against his will.

The question here is not one of due process arising out of a direct pecuniary interest on the part of the magistrate, as in the case of *Tumey vs. Ohio*, 273 U. S. 510, 523. See also *Bevan vs. Krieger*, 289 U. S. 459, 465. It is a matter of interpretation of state legislation of which this court said in the *Tumey* case:

> "* * * Thus matters of kinship, *personal bias, state policy, remoteness of interest,* would seem generally to be matters merely of legislative discretion. * * *" (P. 523.) (Italics ours.)

However, this case seems to come well within the language of the court in the *Tumey* case at page 532 that:

> "* * * Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or *which might lead him not to hold the balance nice, clear and true between the state and the accused,* denies the latter due process of law." (P. 532.) (Italics ours.)

Certainly the average man whose livelihood is and has been for many years absolutely dependent upon the will of one party to an action is in no position to "hold the balance nice, clear and true" between him and one sued by him in deciding the important questions which come before a notary presiding at the taking of depositions in Ohio. As stated by the district judge (R. 49), "I think he was sufficiently interested in any matter in which Mr. Rorick had a personal interest to disqualify him from presiding impartially at the taking of depositions. I do not think the courts should pronounce their benediction upon a practice which would permit one circumstanced as was Mr. Drennan to preside at the taking of depositions."

In *Rhinelander Paper Company vs. The Pittsburgh Mining Company*, 15 O. C. C. (N.S.) 286, cited by petitioner (Brief, p. 26), the court, while holding that the attorneys' clerk was not disqualified (which we submit is a decision which is subject to grave question) expressly said:

> "* * * the attorney of a party may not act in taking a deposition or affidavit. * * *." (P. 287).

We submit that the District Court was entirely right in so ruling. Certainly the District Court's finding in that regard is not unsupported by evidence, and the weight of the evidence, we understand, will not be reviewed by this court.

Vicksburg etc. Ry. vs. Anderson-Tully Co., 256 U. S. 408-415.

Fleischmann vs. U. S., 270 U. S. 349, 355-356.

The second section under which the notary was disqualified is Section 121, O. G. C., which reads as follows:

> "No banker, broker, * * * or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested."

The plaintiff was a banker and a broker. The Spitzer-Rorick Trust & Savings Bank bears his name. Spitzer-Rorick & Company, the partnership, now incorporated as Spitzer-Rorick, Inc., were municipal bond brokers, and plaintiff himself was a broker, being president of Spitzer-Rorick, Inc., and Drennan was a law clerk in the employment of these brokers. (R. 62.) Mr. Rorick was engaged with his partnership "in the marketing and selling of investment securities" (R. 67), particularly as a dealer in municipal bonds (R. 62). "A broker is * * * a dealer in money, bills, notes of exchange, commodities, etc., a dealer in negotiable securities, especially stocks and bonds, such as are dealt in by stock exchanges, especially in England * * *." (Webster's New International Dictionary.)

Section 121 sets forth what is clearly a matter of "state policy," such as is referred to in the *Tumey* case. The state has designated what persons may act as notaries in the taking of affidavits, and has placed limitations upon the right so to act. For example of the application of Section 121, see *Ohio Merchants Trust Co. vs. Conrad*, 42 O. A. 150, 181 N. E. 274, wherein it was held that the interest of a trust company as an unsecured creditor of an estate of a testator was such an interest

that a certain employee of the bank was disqualified from acting as notary public on the widow's election to take under the will in such estate.

When a person who is prohibited from acting nevertheless undertakes to act, the result is the same as though no action had been taken. It is a nullity. The so-called affidavits for attachment were, therefore, not affidavits. They were in legal effect unverified papers, and afforded no warrant for the issuance of any attachment. *Leavitt vs. Rosenberg*, 83 O. S. 230. Consequently the state court could not and did not acquire jurisdiction over any property of the respondent.

(2) THE ATTACHMENT WAS NOT ISSUED AS REQUIRED BY SECTION 11,819, OHIO GENERAL CODE, "AT OR AFTER" THE COMMENCEMENT OF THE ACTION BUT WAS ISSUED BEFORE IT HAD BEEN COMMENCED BY THE FIRST PUBLICATION OF NOTICE TO DEFENDANT.

Section 11,819, Ohio General Code, provides, so far as is pertinent:

> "In a civil action for the recovery of money, *at or after its commencement*, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:
> "1. * * * that the defendant * * * is a foreign corporation."
> "2. Is not a resident of this state;" (Italics ours.)

The grounds of the present attempted attachment in the state court were that the defendant Devon Syndicate, Limited, was a foreign corporation and Singer was a nonresident. The petitioner filed, simultaneously with his

petition in that court (R. 2), his affidavit for attachment, based on these grounds (R. 12). Petitioner went through the motions of having a summons issued and returned not found (R. 8), but it was known by all concerned from the beginning that this was a futile formality, as was shown by the grounds for attachment set forth in petitioner's affidavit. Although he knew and had shown to the court by his affidavit that service of process could not be had upon the defendants otherwise than by publication, *he nevertheless attempted to have the sheriff seize defendant's property, immediately, while refraining for four months from bginning publication of notice.*

Petitioner claims that the mere filing of a petition and the issuance of a futile and unserved summons constitutes the commencement of an action within the meaning of those words, as used in Section 11,819. Respondent contends that such proceedings amount only to an *attempt* to commence an action. The petitioner relies upon Section 11,279 Ohio General Code, which states:

> "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

Respondent relies upon Section 11,230, Ohio General Code, which provides:

> "An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons *which is served on him* or on a co-defendant who is a joint contractor, or otherwise united in interest with him. *When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication,* if it be regularly made." (Italics ours.)

Petitioner claims that no attention should be paid to the clear and precise definition of what constitutes the commencement of an action, found in Section 11,230, because that section is included in a chapter of the Ohio Code which is entitled, "Limitation of Actions" (Chapter 2, Title IV), but petitioner overlooks other provisions which are also found in this same Chapter 2, and which, considered with Section 11,230, clearly establish that compliance with Section 11,279, the section relied upon by petitioner, amount to no more than an *attempt* to commence an action if the summons issued in pursuance thereof is not served. Such other sections in Chapter 2 demonstrate that Section 11,230 is not narrowly restricted in its operations by the words, "within the meaning of this chapter."

Section 11,218, Ohio General Code, which is the first section in Chapter 2, states that a civil action

> "* * * *can be commenced only* within the period prescribed in this chapter. * * *" (Italics ours.)

Of this section the Supreme Court of Ohio has said:

> "It would seem that, under the provisions of our code of civil procedure, it was the intention of the legislature to prescribe a limitation *for the commencement* of *all* actions in this state. * * *" (Italics ours.)
>
> *Doyle vs. West*, 60 O. S. 438-444.

It will be observed that Section 11,218 provides that an action "*can* be commenced *only* within the period prescribed" in Chapter 2, and its provisions are not limited to the purposes of the chapter. It applies broadly to all actions and for all purposes. Therefore, when we find

that Section 11,230 prescribed what is the commencement of an action, "within the meaning of this chapter," we find that we have a definition which is applicable for all purposes. This is, we submit, clearly demonstrated by combining Sections 11,218 and 11,330, and reading them together as follows:

> "A civil action * * * can be commenced only within the period prescribed by this chapter. An action shall be deemed to be commenced at the date of the summons which is served on the defendant. * * * When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made."

Thus it will be seen that the words, "within the meaning of this chapter," in Section 11,230, relate that section to Section 11,218, and when so related it is found that the action can be commenced for *any* purpose *only* by complying with the provisions of this chapter. We reach the same point by changing Section 11,230 to read, and its language certainly necessarily includes such a reading:

> "An action shall be deemed to be commenced within the meaning of Section 11,218," etc.

Manifestly, if the action can not be commenced at all except as permitted by this chapter, it is senseless to claim that Section 11,279 permits its commencement *otherwise* than as permitted by this chapter. The argument on behalf of petitioner leads to the strange result that *for the purpose of permitting an attachment*, an action shall be deemed to have been commenced upon the filing of a petition and the issuance of a futile summons never served upon anyone, but for the purpose of *deter-*

mining whether the Statute of Limitations has been tolled, it shall not be deemed to have been commenced until the first publication of notice to the defendant where publication is proper.

Thus if the filing of a petition and the issuance of the futile summons were within the limitation and the first publication were without the limitation, it would result, according to petitioner's contention, that there would be a valid attachment, although no action had been commenced and none could be commenced, and hence no judgment could be obtained because the period fixed by Chapter 2 had expired.

It is evident that the statutes of Ohio were not intended to lead to any such nonsensical result. They fall into harmony immediately upon observing that Section 11,230 defines what shall constitute the commencement of an action, whereas Section 11,279 does not attempt to do this, but merely states the *initial* steps which must be taken in getting an action under way. It does not attempt to state when the "commencement of the action" shall be deemed *complete for any purpose.* It provides that a petition must be filed and a summons must be issued if an action is to be commenced, but it does not state that so doing will amount to the "commencement" of an action. This is recognized by the court in its opinion in *Royal Indemnity Company vs. Agrios,* 7 O. O. 272, cited three times by petitioner (brief pp. 6, 7, 11). That court after quoting Section 11279 said:

> "The succeeding sections give *further* steps and *prerequisites* for the * * * *completion* or *perfection* of the *commencement of an action.*" (Italics ours.) (P. 273.)

We must look to Section 11,230 for the true rule and there we find that if the summons is served the action shall be "deemed to be commenced * * * at the date of the summons," if within the period fixed by Chapter 2, but if service by publication is necessary it shall be, "deemed to be commenced at the date of the first publication," if within the period fixed by Chapter 2.

Of course there could be no proper publication if *nothing* had been filed in court. Section 11,279 merely prescribes what the first steps must be in commencing an action, but does not state that such steps alone shall constitute the commencement of an action, so as to permit an attachment to issue under Section 11,819.

A consideration of Section 11,231, Ohio General Code, which is in the same chapter with Section 11,230, further demonstrates that petitioner's claim based on Section 11,279 is wrong. Section 11,231 provides:

> "Within the meaning of this chapter, an attempt to commence an action shall be deemed to be equivalent to its commencement, *when the party diligently endeavors to procure a service*, if such attempt be followed by service within sixty days." (Italics ours.)

Thus, one who, in pursuance of Section 11,279, files a petition and causes a summons to issue, *which is not served*, notwithstanding a diligent endeavor to do so, will not have "commenced" an action, but will have made, under Section 11,231, "an *attempt* to commence an action." In this case petitioner attempted to commence an action by filing a petition and causing summons to issue, but the summons was not served and thus the attempt to commence an action failed. Petitioner, however, with-

out having commenced an action, nevertheless had his attachment issue and then waited about four months before beginning publication of notice. Thus the order of attachment in the action was not issued as required by Section 11,819, "at or after its commencement," but was issued at a time when petitioner had attempted to commence it and had failed in the attempt. According to petitioner's contention, an attempt to commence an action should be treated as the legal equivalent of the proper commencement of it, without any time limitation, regardless of the provisions of Section 11,231, which require that an attempt to commence an action

> "* * * shall be deemed to be equivalent to its commencement, when the party diligently endeavors to procure a service, *if such attempt be followed by service within sixty days.*" (Italics ours.)

Under petitioner's claim that he might wait four months, it would follow that he might wait four years or 40 years after having made his abortive attempt to commence an action, and during all such time that he would have a valid attachment, notwithstanding the lack of notice or any attempt to give notice to the defendant and notwithstanding the statute of limitations might bar the action in the meantime. Manifestly, this can not be the rule. An order of attachment binds the property attached from the time of service. Section 11,837. This, of course, means a valid attachment, and clearly can not mean that property of the defendant may be bound by an attachment obtained before the commencement of any action. Due process requires *notice* and hearing.

Coe vs. Armour Fertilizer Works, 237 U. S. 413, 424-425.

To say that defendant's property may be bound and held indefinitely without any notice to defendant is to say that his property may be seized and held without due process.

When property is garnisheed in Ohio it is provided that the

> "* * * garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice hereinbefore mentioned. * * *" (Section 11,837, Ohio General Code.)

Further, suit may be brought against the garnishee if he fails to answer or if his answer is not satisfactory to the plaintiff. Section 11,851. Such suit against the garnishee may proceed to the point of a finding of the existence of indebtedness from him to the defendant (although not to final judgment against him) *before* judgment is entered against the defendant in the attachment proceeding. Section 11,853. *Olcott vs. Guerinck*, 19 C. C. 32, 10 C. D. 131. If plaintiff's property has been seized, or the cost of holding the property is excessive, the court may order it sold. (11843 O. G. C.) Under petitioner's claim as to the proper procedure, all of these proceedings could go forward without the publication of any notice to the defendant in the original case or any opportunity for him to learn of what was going on. Clearly this cannot be the proper rule. Furthermore, under Section 11,848, the garnishee may pay the money into court and be *discharged from liability to the defendant.* Manifestly this would deprive defendant of his property without due process unless notice had been given to him of the pend-

ency of the proceeding. Ohio has recognized this by providing as herein shown that the first publication must precede, or be simultaneous with, the attachment.

We have gone at some length into this discussion of the proper construction of the Ohio statutes for the reason that there is no decision of the Supreme Court of Ohio which directly considers and decides the *precise* question which is now under discussion and because there is some conflict among the lower courts. In *Royal Indemnity Company vs. Agrios*, 7 O. O. 272 (1936), cited by petitioner (brief p. 6) the Common Pleas Judge said:

> "So far as counsel and the court have been able to ascertain a direct decision on this question has never been reported." (P. 272.)

However, there are a number of decisions of the Supreme and other courts of Ohio which show that the Circuit Court of Appeals in the present case properly construed and gave effect to Section 11,230.

In *Lambert vs. Sample*, 25 O. S. 336, the question before the court was whether any action had been commenced in which defendant *could* enter an appearance, the attempted service of summons on the defendant not having been in accordance with law. *No question of the Statute of Limitations was involved.* The court applied that part of Section 11,230 of the Code, which reads:

> "An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him * * *."

and said:

> "Under the provisions of Section 20" (now Section 11,230) "of the Code the action can not be deemed to have been commenced,"

and affirmed an order reversing a judgment for plaintiff. Thus the Supreme Court of Ohio applied the section just as was done by the court below in the case at bar.

In *Totten vs. Lawton*, 4 C. D. 518, the Circuit Court of Hamilton County referred (page 380) to R. S. 4987 (now O. G. C. 11,230) and held that section was the determining factor on the question when an action was commenced where the issue was as to which of two actions in different courts had been commenced first. No question of statute of limitations was involved.

The same use of Section 20 (11,230) was made in the same kind of an issue by Mr. Justice McLean in *Bell vs. Ohio Life and Trust Company*, Fed. Cases 1260, 1 Biss. 260. He shows very clearly that the mere filing of a petition and *issuance of a summons does not constitute the commencement* of an action in Ohio, and said:

> "* * * *The other indispensable requisite, the service of the process, and the date of that service, to give jurisdiction of the subject matter of the controversy, seem to be indispensable.* * * *"* (P. 112.) (Italics ours.)

In *Smith vs. Whittlesey*, 19 C. C. 412, 10 C. D. 377-379, the Circuit Court of Lucas County held that it was not necessary to have a summons issued and returned "not found," when the defendant was known to be a non-resident. The court said in part:

> "* * * To issue a summons is for the purpose, certainly, of notifying the defendant; to serve him in a certain manner, as the statute has pointed out. But, if he is beyond the jurisdiction of the court and cannot be served, that formality is idle. If this is known in advance, it is clear, in our judgment, that a party may file an affidavit in the first instance, with his petition, for the purpose of ob-

taining service. We think it is then a pending suit. *It is a pending action when it has been served upon him, or, if it has been published it is a pending action.*" (P. 417.) (Italics ours.)

The court necessarily based this holding upon R. S. 4987 (now Section 11,230) and here again no question of the Statute of Limitations was involved.

In *Larwill vs. Burke,* 19 C. C. 449, affirmed by the Supreme Court of Ohio without opinion, 66 O. S. 683, the court discusses the decision in the case of *Smith vs. Whittlesey, supra,* and says:

"* * * But if we were to follow that decision, we would find ourselves met by another trouble.

"There was no affidavit filed in the case *to obtain service by publication;* these steps both being required by the statute, and *both being conditions precedent to the court taking jurisdiction either of the person or of the property.*

"We can not say that they can be overlooked.

"And we hold that no jurisdiction was had in the case, either over the person of the defendant, or the property that was subjected to the attachment proceedings and sold by the court." (P. 470.) (Italics ours.)

Issuance of an attachment does not constitute the commencement of an action. It is auxiliary to an action which must have been already commenced or there can be no attachment. *Seibert vs. Switzer,* 35 O. S. 661, 665.

In *Seibert vs. Switzer* the attachment was issued several hours prior to the filing of the petition, which was filed later on the same day. The Supreme Court held that the attachment was void as it had issued before the action had been commenced. In the case of *Doherty vs. Cremering et al.,* 83 Fed. (2nd) 388, which the court be-

low followed in its decision in the case at bar, the court applied the rule of *Seibert vs. Switzer,* holding that the beginning of publication is just as essential a part of the commencement of an action under Section 11,230 as is the filing of the petition, and, hence, that *an attachment prior to publication is just as defective as one prior to the filing of the petition.*

There is one case in Ohio, *Bacher vs. Shawhan,* 41 O. S. 271, decided by the Supreme Court Commission, which petitioner claims is in point and opposed to the decision of the court below in the case of *Doherty vs. Cremering.* In fact, however, the question now under discussion was not presented to the Supreme Court Commission or decided by it. As is pointed out by the court below in *Doherty vs. Cremering* the commission made no reference to Section 11,230 (then Section 4987 R. S.) in its opinion. Section 11,218 and the other relevant sections hereinbefore discussed were not called to the attention of the commission. The commission in no way considered or passed upon the question which was decided by the court below in *Doherty vs. Cremering* and followed by the court below in this case as to the effect of Section 11,230 in connection with attachment actions. The opinion of the commission in *Bacher vs. Shawhan,* shows, page 272, that the argument presented to it was that the court below had "*lost* jurisdiction because the attempt to commence the action was not followed by service within 60 days" as required by Section 4988 R. S. (now Section 11,231, O. G. C.), in response to which the court said:

> "We are not aware of any statutory provision *ousting the jurisdiction* for plaintiff's delay or neglect." (Italics ours.)

Thus it appears that what the commission was considering and all that it decided was whether the court below had *lost* jurisdiction because of *plaintiff's delay or neglect*. The question whether the court below *had ever acquired jurisdiction* was not presented to the commission. A reading of the opinion demonstrates that this question was in no way passed upon or considered by it. Whether the attachment had been issued "at or after the commencement of the action" was not discussed or even noticed by the commission. (But note that the commission spoke of the filing of the petition and the issuance of the futile summons as "the *attempt* to commence the action.") (Italics ours.) The question which is now here *might* have been raised and decided in that case but it was not. The apparent conflict relied upon by respondent between the decision of the Supreme Court in *Bacher vs. Shawhan*, and the decision of the court below in this case, upon analysis of *Bacher vs. Shawhan*, is, therefore shown to be non-existent. The cases were presented, argued and decided upon entirely different theories. The decision is not a precedent upon a point which might have been, but was not, presented to and decided by the court.

Petitioner cites several lower court decisions in Ohio which are in conflict with the decision of the Ohio courts hereinbefore cited. The clear weight of authority in Ohio, however, supports the ruling of the court below in this case and in *Doherty vs. Cremering*.

The attachment in the case at bar, having been prematurely issued, and being a nullity when issued, of course, could not have new life breathed into it by the subsequent publication of notice. This is made clear by

the decision of the Supreme Court in *Pope vs. Hibernia Ins. Co.*, 24 O. S. 481, in which the court said, at page 485:

> "* * * The attachment previously issued being a nullity, no jurisdiction could be acquired under it by subsequent amendment. The amendment merely made a case which authorized proceedings to acquire jurisdiction. It did not quicken that which was without legal vitality, and confer jurisdiction by virtue of what has been done without any bases of legal authority.
>
> "Amendments, where the court obtains no jurisdiction, are of no avail. * * *" (Pp. 485, 486.) (Italics ours.)

A recent lower court decision in harmony with the holding of the Circuit Court of Appeals in this case is *Bear vs. Old Tyme Distilleries, Inc.*, 5 Ohio Opinions 530 (Court of Common Pleas of Franklin County), in which it was held:

> "Where, at the time a petition in an action for money judgment was filed, an affidavit for constructive service and an affidavit for attachment and garnishment were filed and orders for garnishment and attachment issued on the same date, *notice being published four days later*, there being no summons issued in the case, *under the provisions of Section* 11,230, *General Code, the action was not commenced until the first publication of the notice*, and the attachment was void under Section 11,819, General Code, providing for an attachment at or after the commencement of the action." (Syl.) (Italics ours.)

The fact that no summons had been issued in the case last cited, although mentioned in the syllabus, is, we submit, of no importance under the decision of the Circuit Court of Lucas County in *Smith vs. Whittlesey,*

supra, to the effect that no summons need be issued in a case like that at bar where it is known in advance that it is impossible to serve it.

In the case of *Cleveland and Western Coal Co. vs. J. H. Hillman and Sons Co.,* 245 Fed. 200, Judge Westenhaver, sitting in the District Court for the Northern District of Ohio, held:

> "* * * Under the Ohio law, an action is pending, so as to stop the running of the statute of limitation from the time process is issued, only when actual service is made within 60 days thereafter. General Code, Sections 11,230, 11,231. An attachment can be issued only at or after the commencement of an action. General Code, Sections 11,279, 11,280." (P. 203.)

There is no merit to the petitioner's claim (brief p. 12) that under the rule followed by the lower court herein, the attachment must (although of course it may) be levied on the day of the first publication. That court did not hold that the publication must *precede* the attachment. Under the rule stated by it (R. 96) the attachment may *accompany* or follow the first publication but must not precede it.

It is respectfully submitted that the great weight of authority in Ohio is in favor of the application of Section 11,230 in the manner in which it has been applied by the Circuit Court of Appeals in the case at bar. In practice there is not the slightest difficulty in following it, as is being demonstrated every day.

(3) THE SHERIFF'S RETURN OF THE ORDER OF ATTACHMENT WAS INSUFFICIENT IN THAT IT FAILED TO STATE THE NAMES OF THE GARNISHEES, AND THE TIME EACH WAS SERVED, AS REQUIRED BY SECTION 11,836 OF THE OHIO GENERAL CODE, AND THERE IS NO SHOWING THAT THE ORDER OF ATTACHMENT WAS SERVED ON THE GARNISHEES AS REQUIRED BY SECTION 11,833.

As hereinbefore stated but one order of attachment (R. 6) was issued by the state court, and hence, but one return of such order was made by the sheriff (R. 9). This return was made on June 23, 1930. It reads in its entirety as follows:

> "Received this writ June 19, 1930, and there being no goods or chattels, lands or tenements found by me in Lucas County, Ohio, belonging to the within named Devon Syndicate, Ltd., et al., on which to levy, this writ is hereby returned, no money made, not satisfied."

The statute dealing with the return to be made on the order of attachment is General Code Section 11,836. Its terms are mandatory and most specific. The pertinent part of the section is as follows:

> "The officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached. *When garnishees are served their names and the time each was served MUST* be stated. * * *" (Emphasis ours.)

It has been specifically held that the provisions of Ohio General Code Section 11,836, quoted above, are man-

datory and must be complied with to secure a valid attachment. *Green vs. Coit,* (1909) 81 O. S. 280:

> "Section 5537, Revised Statutes, which provides that 'the officer shall return upon every order of attachment what he has done under it, and the return must show the property attached,' makes it necessary that the return shall show all the essential things the officer has done in the execution of the writ, and shall so describe the property as to identify it.

Section 5537 of the Revised Statutes referred to is now Ohio General Code Section 11,836 quoted *supra.*

It did not appear in the case just cited whether the sheriff had in fact complied with the requirement of leaving a copy of the order of attachment with the occupant or posted in a conspicuous place on the premises. However, the court cited with approval authority for the proposition that *compliance in fact was immaterial if it was not shown in the return.* In this connection we note that petitioner claims that copies of the orders of attachment were in fact left with the garnishees and refers the court to page 44 of the record. There is no evidence on that page or anywhere else in the record that the sheriff did any such thing.

Another case recognizing the mandatory provisions of Ohio General Code Section 11,836 is *Weirick vs. Lumber Company,* (1917) 96 O. S. 386. This case involved the priority of various attachments and the court held that compliance with the provisions of Section 11,836 as to what the return on the order of attachment must show were mandatory and if not followed the purported attachment was void and of no effect. The court said, page 396, that the return must show the property attached

and the time it was attached and that this "brings the property within the custody of the court, unless there are garnishees, when that fact *must* also appear in the return, agreeable to the statute." (Italics are the court's.)

Petitioner claims (brief P. 35) that the *Weirick* case holds that it is not necessary for the return to show that a copy of the order was left with the garnishee. As just shown, it holds the opposite by reason of the express requirement of Sec. 11836. What it holds the return need not show is that a copy of the order was left "with the owner or occupant" of attached real estate, as Sec. 11836 does not require that the return show this fact.

Under the foregoing authorities it is the settled law of Ohio that the return *on the order of attachment* must show a strict compliance with the mandatory provisions of General Code Section 11,836 and as that statute provides, *must* show the names of the garnishees, that they were served with the *order of attachment*, and the time that each was served, *none of which requirements was met in the return on the pretended order of attachment in the instant case.* Therefore, the pretended order of attachment and the pretended garnishments in the state court based thereon were unlawful and invalid.

The petitioner's claims that the sheriff's return on the *order of attachment* should be supplemented by, and read in connection with, the endorsements which the sheriff placed upon the "Notice to Garnishee" (R. 14) and that if these two are read together and *treated as though they both constituted the sheriff's return upon the order of attachment* that it will *then* appear that the sheriff did comply with Section 11,828 and did state in his

return of the order of attachment the names of the garnishees and the time each was served with the order.

The difficulty with this argument is that it merely amounts to saying that if the sheriff *had* included in his return of the order of attachment something which he did *not* include therein, that *then* it would appear that he had carried out the mandatory provision of Section 11,828.

The endorsement which the sheriff placed upon the "Notice to Garnishee" is not called for by any statute and the endorsement on the Notice to Garnishee of what the sheriff has done with it is entirely unauthorized. The notice to garnishee is not the writ of attachment. The writ of attachment is the *order* of attachment and it is upon the *order* of attachment that there "*must* be stated" what, if anything, the sheriff has done under it. The sheriff's endorsement upon the notice to garnishees is a mere stray paper. It has no effect, whether it be lodged in the clerk's office or held by the sheriff, or never made at all.

Authorities such as are cited in petitioner's brief, page 36, to the effect that, an inadvertent omission of a few words from one *authorized and required* return may be helped out by another *authorized and required* return of an officer made *simultaneously* are not here in point. They would be in point only if they held that an authorized but defective return may be treated as free from defect if the officer, *not* acting within the scope of any authority conferred upon him by law, has made, *aliunde* the record, some seven days later a correcting statement. But this is not the law of Ohio. In *Root vs. Railroad Company*, 45 O. S. 222, the Supreme Court of Ohio had occasion to

pass upon the legal effect of an unauthorized statement by a sheriff in a return of execution that he had:

> "* * * levied it upon certain property *subject to the attachment of Root & Co.,* * * *." (P. 231.) (Italics ours.)

The court said that part of that statement which we have italicized

> "* * * was not a necessary part of his return on that writ; * * *" (P. 231.)

and

> "* * * it is well settled that the return of an officer is conclusive as to such parties and privies *only as to such facts as it was his legal duty to state.* * * *" (P. 232.) (Italics ours.)

and further said:

> "* * * A return upon a writ properly embraces no more than a pertinent history of what was done by the officer in executing it according to its requirement; and where it is made to include matters outside of such history, *the matters so incorporated constitute no part of the return,* and are not evidence even as between parties, much less as between strangers." (P. 232.) (Italics ours.)

So here, where the sheriff made what he called a return upon the Notice to Garnishee, he was doing something which was unnecessary under the requirements of the statutes and which he was wholly unauthorized to do, and, hence, the endorsement on the notice is not evidence of anything as between the parties and can not be engrafted on the return of the order of attachment.

Furthermore, Section 11,833, Ohio General Code, provides that the order of attachment shall be served upon the garnishee. The first sentence of the section reads:

"If the garnishee is a person, *a copy of the order* and notice shall be served upon him personally, or left at his usual place of residence. * * *" (Italics ours.)

The mere service of notice upon the garnishee is not sufficient. The "Sheriff's Return," endorsed on the Notice to Garnishee, even if it could be read in connection with the sheriff's return on the order of attachment, would still fail to cure the defect in the latter for his so-called return endorsed on the Notice to Garnishee (R. 11), merely states that he has delivered to the garnishee, "a true and certified copy of *this writ with all endorsements thereon.*" Manifestly by the use of the words, "this writ," he was referring to the Notice to Garnishee upon which the return was endorsed and not to the order of attachment. Therefore, even reading the two returns together, it affirmatively appears that the order of attachment was not served upon the garnishees as required by Section 11,833 and that all that was served upon them was the notice. Thus there is a fatal defect in the proceedings, even though petitioner's request that the two returns be read together could be granted.

In *Ireland vs. Adair*, 12 N. D. 33, 94 N. W. 766, the Supreme Court of North Dakota, under statutes similar to the Ohio statutes, had before it the question as to whether an attachment was valid where the order of attachment had been served upon the garnishee but the notice to garnishee had not been served, *service of both being required in that state, as in Ohio,* under Section 11,833. The Supreme Court of North Dakota held:

"The judgment entered in this case is void for want of jurisdiction in the court to enter it; * * *." (Syl. 3.)

In the opinion the court said, in part:

> "* * * The property here sought to be subjected to the lien of the attachment was a debt due to the defendant, and, under the imperative requirements of the statute, could only be attached in the method indicated. The proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder. *Rudolph vs. Saunders,* (Cal.) 43 Pac. 619; *Courtney vs. Bank,* 154 N. Y. 688, 49 N. E. 54; 4 Cyc. 583, 589. Section 5381, Rev. Codes, requires the sheriff, when the warrant of attachment has been fully executed, to return the same, with his proceedings thereon, to the court in which the action was commenced. It is his duty to state in his return what acts he performed in the execution of the warrant, so that the court may decide upon its sufficiency. *We must therefore assume that in his return the sheriff stated all he did toward effecting a levy. Sharp vs. Baird,* 43 Cal. 577; *Watt vs. Wright,* (Cal.) 5 Pac. 91; *Rudolph vs. Saunders,* (Cal.) 43 Pac. 619. The sheriff's return in this case does not show even a substantial compliance with the statute. It does not disclose the service upon Pearson and LaDu, or either of them, of a notice showing the property levied on. *This is fatal to the attachment.* * * * There being no lawful attachment of property in this case, the court was without jurisdiction. * * *" (P. 767.) (Italics ours.)

It is just as imperative under Section 11,833, Ohio General Code, that the order of attachment be served upon the garnishee as that the notice be served upon him. There is no showing in the record that the order of attachment was in fact served on the garnishees. Therefore, the suggestion in petitioner's brief (p. 37) that the sheriff's return may be treated as amended to

show such service is without merit. The return as made is conclusive between the parties, *Phillips vs. Elwell*, 14 O. S. 240. Consequently the proceedings in the case at bar are void for the same reason that the proceedings in the North Dakota case just cited were void.

(4) THE SHERIFF'S RETURN SHOWED AFFIRMATIVELY THAT NO PROPERTY OF THE DEFENDANT HAD BEEN REACHED OR SUBJECTED TO THE JURISDICTION OF THE COURT AND SUCH RETURN IS CONCLUSIVE AND BINDING UPON THE PARTIES

Section 11,836, Ohio General Code, provides:

> "The officer shall return upon every order of attachment what he has done under it. The return *must* show the property attached and the time it was attached. * * *" (Italics ours.)

In *Green vs. Coit*, 81 O. S. 280, the Supreme Court held that Section 5537, Revised Statutes, now Section 11,836, Ohio General Code:

> "* * * makes it necessary that the return shall show all the essential things the officer has done in the execution of the writ, and shall so describe the property as to identify it." (Syl. 1.)

and further held that a return of an order of attachment which

> "* * * fails to so describe the property as to identify it, is insufficient to give to the court out of which the writ issued dominion over the property." (Syl. 2.)

It necessarily follows that when the sheriff's return describes *no* property and says that *he has found no property*, that the court *acquires dominion over no prop-*

erty, and, hence, (there having been no personal service of process), *acquires no jurisdiction over anything.*

> "* * * the court in such a suit cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. *A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.*" (P. 189.) (Italics ours.)
>
> *Freeman vs. Alderson*, 119 U. S. 185-189.

As has been shown in the next preceding section of this brief, the sheriff's return upon the order of attachment is the *only* return which he is authorized to make. Having made a return on that order that "no goods or chattels, lands or tenements" had been found by him in Lucas County, Ohio, "belonging to the within named Devon Syndicate, Ltd., *et al.*, on which to levy," it necessarily follows that this affirmatively established complete lack of jurisdiction in the state court.

Even if, contrary to the holding of the Supreme Court of Ohio in *Root vs. Railroad Company*, 45 O. S. 222, discussed in the next preceding section of this brief, it were possible to supplement the sheriff's return of the order of attachment by his so-called sheriff's return endorsed on the Notice to Garnishee (R. 11), the situation would still be unchanged for the "return" on the Notice to Garnishee does not show that any property whatsoever was attached. Reading the two returns together we have the sheriff stating that he had served certain persons with notice that they had been garnisheed in the case, but that he had found no goods, chattels, lands or tenements belonging to the defendants in the possession of the garnishees or elsewhere in Lucas County, Ohio.

The words, "goods" and "chattels," include debts, choses in action, stocks, securities, money, etc. See definition of "goods and chattels, Bouvier's Law Dictionary —Rawle's Third Edition, and Black's Law Dictionary.

Hall vs. State, 3 O. S. 575;
Hawkins vs. State Loan & Trust Company, 79 Fed. 50;
Gibbs vs. Usher et al., Case No. 5387—10 Fed. Cases 303.

It is therefore respectfully submitted that under any possible construction of the proceedings of the sheriff and whether or not his two returns be put together and treated as one, he affirmatively reported to the court that he had found nothing and attached nothing. His return, so long as it remains uncorrected and undisturbed by order of court, is conclusive as between the parties to the action. This question was before the Supreme Court of Ohio in the case of *Phillips vs. Elwell,* 14 O. S. 240, in which the court said, in part:

> "Notwithstanding some decisions, the weight of authority clearly is, that an official return, duly made upon process by a sworn officer, *in relation to facts which it is his duty to state in it,* is, as between the parties and privies to the suit and others whose rights are necessarily dependent upon it, conclusive as to the facts stated therein, until vacated or set aside by due course of law; * * *." (P. 244.) (Italics ours.)

The fact that one of the garnishees (being under control of petitioner) has seen fit to file an answer (R. 25-44), in which it asserts that it is indebted to, and holds property of, the defendant is of no importance in the face of the sheriff's return. Garnishees are not parties

and a voluntary appearance and admission of indebtedness, upon the part of a garnishee, obviously can not give the court jurisdiction over the defendant's property if the statutory steps necessary to the creation of an attachment lien have not been taken.

It results, we submit, from the foregoing, that the record affirmatively shows no jurisdiction whatsoever was acquired over any property of the defendant by the state court.

(5) THE ORDER OF ATTACHMENT AS ISSUED WAS FOR THE JOINT PROPERTY OF THE DEFENDANTS AND THE ONLY PROPERTY WHICH PETITIONER CLAIMS WAS REACHED BY THE ATTACHMENT IS PROPERTY ALLEGED BY THE GARNISHEES TO BE THE SEPARATE PROPERTY OF THIS RESPONDENT.

We have, we believe, shown in the preceding section of this brief that the record affirmatively shows, in a way binding upon petitioner that *no* property of defendant was reached by the attachment proceedings in the state court. Still standing upon that position, we now show the court that even upon the petitioner's claim that some property was reached, the record affirmatively shows that such claim can apply only to *separate* property of this defendant, whereas the only order of attachment which issued from the Court of Common Pleas (R. 9) commanded the sheriff to attach

> "* * * the Lands, Tenements, Goods, Chattels, Stocks, or interest in Stocks, Rights, Credits, Moneys and Effects, in your county, of Devon Syndicate, Ltd., *and* Paris E. Singer * * *." (Italics ours.)

In the notices to garnishee (R. 10, R. 13) they were required to answer

> "* * * touching the property of every description, and credits, of the defendants Devon Syndicate, Ltd., *and* Paris E. Singer in their possession, or under their control, and they shall disclose truly the amount owing by them to said *defendants*, * * *." (Italics ours.)

The order and notice were issued pursuant to affidavits filed by the plaintiff (R. 6, R. 12), wherein he stated that he had good reason to believe the named garnishee had property belonging to "Devon Syndicate, Ltd., *and* Paris E. Singer." In the affidavit filed six years later in the District Court petitioner, for the first time, referred to the separate property of each defendant, as well as to their joint property, thus tacitly admitting the error in the state court proceedings.

In this connection it is of interest to observe that plaintiff's petition (R. 2) asserts a *joint* liability against Devon Syndicate, Limited, and Paris E. Singer, and "prays judgment against said *defendants.*" The action was thus a joint action and the attempt was made only to reach the joint property of the defendants.

The only foundation there can be for petitioner's claim that some property was reached by attachment (despite the sheriff's return that none was reached) is found in the answers of the garnishee (R. 25), in which it alleges that it is indebted to and holds property of the "defendant, Devon Syndicate, Ltd."

We contend that there can be no valid attachment of the *separate* property of one defendant in pursuance of affidavits, order of attachment and notices of garnishment, all of which refer only to property *jointly* owned

by two defendants, and that the attachment would be void even if the sheriff's return had stated what is alleged in the garnishee's answer.

In *Winchester, Irwin & Co. vs. Pierson & Avery,* 1 O. D. Reprint 169, Superior Court of Cincinnati, the court passed upon a motion to quash the return of service and set aside the attachment because the property attached was the individual property of one of the defendants only, while the writ of attachment had been issued against their joint estate. The court said:

> "Requiring the creditor to pursue the statute strictly, confining him to its letter, can he attach the separate estate of a joint debtor by a writ issued against the joint estate only? I think not. By so issuing he confines the attachment to the joint estate. 2 West. L. J., 296. If he desires to reach the separate estate, the writ should issue against the separate estate. The writ may issue to attach the property of the defendants, or that of any of them, or property of both descriptions.
>
> "In proceedings under this statute, before jurisdiction attaches to proceed in the cause, it must appear that the defendants are the debtors of the plaintiff, that the defendants have absconded, or are non-residents, and that the property against which the writ issued must be attached. 7 O. R. 259, Pt. 1. The writ in this case, issued against the joint property of the defendants as partners. No such property has been attached. The writ was properly issued; but the officer has failed to find the property against which it issued; and it stands like any other case where process has been issued and not served." (Pp. 170, 171.)

In *Feidler vs. Blow, Owens and Gallespie,* 1 O. D. Reprint 245 (Supreme Court of Ohio, Hamilton County), it was held:

"* * * where a writ of attachment issues against the joint property of three defendants, the separate property of one cannot be attached. * * *" (Syl.)

The court said:

"Where two or more are jointly bound, or indebted, the statute authorizes a writ of attachment to issue against the separate or joint estates, or both, or any of them, but in this case the writ issued against the joint property only.

"The writ did not authorize the attaching of the separate property. As no joint property or effects were found, we cannot say that the Superior Court erred in this particular." (P. 245).

As above shown, it affirmatively appears that the only property which petitioner *claims* was reached by the order of attachment and notice of the garnishee is the separate property of Devon Syndicate, Limited, reported in the answers of the garnishee (R. 25). The record contains no attempt to show even by answers of the garnishees that any property owned by Devon Syndicate, Limited, *and* Paris Singer was in the possession of anybody in Lucas County, Ohio.

We submit that the writs issued by the Common Pleas Court of Lucas County against the *joint estate* of both defendants did not authorize the attachment or garnishment of the *separate* property of this defendant, and hence the State Court for this additional reason failed to obtain any jurisdiction of the cause.

(6) THE PUBLICATION OF NOTICE TO THE DEFENDANT IN STATE COURT WAS FATALLY DEFECTIVE IN THAT IT FAILED TO MENTION THAT THE OBJECT OF THE PETITION WAS TO OBTAIN SATISFACTION OF PLAINTIFF'S ALLEGED CLAIM BY ATTACHMENT OF THE DEFENDANT'S PROPERTY

Section 11,292, Ohio General Code, provides when service may be made by publication. The paragraph of that section here applicable reads as follows:

> "Service may be made by publication in any of the following cases:
>
> * * * * *
>
> "7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence cannot be ascertained;
>
> * * * * *"

Section 11,295, Ohio General Code, provides how the publication must be made and what it must contain. On the latter subject it provides:

> "* * * It must contain a summary statement of the *object* and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer." (Italics ours.)

The notice which was published for the defendants in the state court (R. 16) gave them no information whatsoever to the effect that any attachment proceedings had been begun against them or that it was the plaintiff's object to satisfy whatever judgment he might obtain out of

property of the defendants in Lucas County, Ohio. It merely advised them of the filing of the petition and of the amount claimed and of the date they were required to answer.

In a case in which, as here, it is known at the time of filing the petition that the defendants cannot be personally served, as is shown by the simultaneous filing with the petition of the affidavit for the attachment of defendant's property on the ground of non-residence (R. 12, R. 13) it is perfectly clear that the "object * * * of the petition" is to obtain satisfaction in whole or in part of plaintiff's claim, not by personal judgment but by attachment and sale of defendant's property within the jurisdiction of the court. It is, therefore, necessary to a valid publication of notice in such a case, under Section 11,295, Ohio General Code, that the notice advise the defendants of the fact that the action includes proceedings for the satisfaction of plaintiff's claim by attachment of defendant's property. Obviously a mere notice to a nonresident (who knows that no personal service has been or can be had on him) that he has been sued does not call upon him to take any action to protect himself. If he is not notified of the attachment proceedings, he is not placed on notice of anything requiring action on his part.

Petitioner has himself recognized that this is the necessary kind of notice by the notice (Appendix page 89) which he caused to be published in his attempt to secure an attachment in the District Court after removal. (R. 33). By that notice he advised the defendant not only that he had filed his petition, but that he had filed his affidavit in garnishment "on which said affidavit, orders of attachment and notices to garnishees have been

issued by the clerk of said court and served on" the garnishees, naming them "attaching such monies, property and assets of defendant, Devon Syndicate, Limited, and/or defendant Paris E. Singer in their possession and control, due and payable or to become due and payable to either one or both of said defendants, said monies, property and assets being more particularly described in said supplemental affidavit and attachment." Thus again petitioner tacitly admitted the existence of a defect in his state court proceedings in which the notice contained nothing of this character.

Petitioner in his brief herein says (p. 12):

> "On theory, the *very purpose of publication is to notify the defendant that his property has been attached.*" (Italics ours.)

The Supreme Court Commission of Ohio held in *Core vs. Oil and Oil Land Co.*, 40 O. S. 636 (1884), that a notice which stated *"that an attachment has been issued in said case"* is sufficient notice without a description of the attached property. The Circuit Court of Hamilton County made the same ruling in *Daniels vs. Taylor*, 13 O. C. C. (N. S.) 116 (1910), saying in explanation, page 118:

> "* * * the kind of personal property can be readily ascertained by him by referring to the sheriff's return * * *."

In *Moses vs. McKim*, 2 Western Law Weekly, 15, 2 Ohio Decisions Rep. 180 (1859), the Court of Common Pleas held that a notice which did not "set forth the issuing of an attachment" was insufficient. The court said in part:

> "* * * What, then is the object of the suit? Is it not to obtain a money judgment against the defendant, and an order of sale of the attached property for its payment? As the judgment has no binding force, except as to the attached property, it would, perhaps be better to say, that the object of the suit is to obtain an order for the sale of the attached property, as on execution, and the application of the proceeds to the payment of the amount found due from defendant to plaintiff, on the cause of action in the petition stated. And unless the issuing of an attachment and description of the property attached are inserted in the notice, the true object and design of the petition or action is not stated. Unless these facts are stated, nothing is set forth to show the jurisdiction of the court —nothing showing that the non-resident is bound to appear or make defence. * * *" (P. 181).

In *Endel vs. Liebrock* 33 O. S. 254, it was contended that the notice was insufficient because (among other reasons) it failed "* * * to state that an order of attachment was issued in the case". The court said at page 268:

> "Without noticing the other defects apparent on the record, such as the omission of an affidavit for publication, as required by section 71 of the code, or that the notice published was defective, in not stating the *court* in which the case was pending, and *in not stating a summary of the object of the petition*, and in being misleading as to the nature of the causes of action and amount sued for, we think the fact that there was not the requisite affidavit to authorize the issuing of the attachment, renders all subsequent proceedings under it void." (Italics ours).

In *Mares vs. Schuth*, 28 Pac. 2d 527 (1933) (Supreme Court of N. M.), it was held:

> "Plaintiff's failure to comply with statute in securing service on principal defendant invalidates judgment as to him and also against garnishee." (Syl. 1).
>
> "Where notice to non-resident principal defendant did not state that his money would be applied and his effects disposed of to pay judgment, court had no jurisdiction to award judgment against money and property of principal defendant in hands of garnishee." (Syl. 3.)

In *Smith vs. Montoya*, 1 Pac. 175 (Supreme Court of N. M.) (1883), it was held:

> "In attachment proceedings the statute requires that the citation by publication shall contain a notice to the defendant 'that his property had been attached, and unless he appeared * * * judgment would be rendered against him, and his property sold to satisfy the judgment.' This requirement was not repealed by the acts of 1862 or 1874, and its omission, unless cured by a voluntary appearance, renders the citation void, and no jurisdiction is acquired thereby against the defendant or his property, even in a proceeding *in rem*." (Syl. 3.)

It thus appears that the attempted service by publication in the state court did not comply with the statute, in that it did not advise the defendants of the attachment proceedings and hence gave them no notice of the object of plaintiff's petition. It therefore was void and wholly ineffective and the case stood at the time of removal to Federal Court in exactly the same position as though *nothing had been done toward commencing an action except to file a petition.* No personal service of summons had been had upon the defendants, no publication which

had the slightest validity had been made, and the attempt to seize defendant's property as a basis of jurisdiction was in clear violation of the Ohio statutes. This attempt was therefore void, as we have shown, and hence the proceedings which petitioner claims to have amended by proceedings in the federal court were a complete nullity from the beginning to the end.

Even if, contrary to the great weight of Ohio authority, it should be held that the order of attachment could validly issue before the first publication of notice, petitioner's claim of jurisdiction in the state court fails because of his failure to include notice of the attachment proceedings in his publication in the state court.

II

(1) THE ATTEMPTED ATTACHMENT BY PROCESS OF THE FEDERAL COURT WAS WHOLLY INEFFECTUAL BECAUSE THE STATE COURT PROCEEDINGS BEING VOID AFFORDED NO BASIS FOR AMENDMENT IN EITHER STATE OR FEDERAL COURT. THE FEDERAL ORDER OF ATTACHMENT WAS NOT AN AMENDMENT OF THE STATE ORDER.

At the outset it should be pointed out that although the petition and affidavit filed in Federal Court were called amended and supplemental, they are not in fact amendments of the proceedings which had been had approximately six years previously in the state court. Petitioner filed in the District Court an entirely *new* set of pleadings and repeated *all* of the previous proceedings, including the filing of a new petition, a new affidavit in attachment and garnishment, and a new affidavit for

constructive service, and had issued a new summons for both of the defendants (one of whom was then dead), to notify the defendants, "that they have been sued * * * *in the District Court of the United States,* within and for the Western Division of the Northern District of Ohio," (R. 86), and had issued a new order of attachment and new notices to the garnishees (R. 37-39). The present record shows no new publication of notice to defendant, but as stated (p. 5 hereof), we are willing to stipulate that a new publication was made beginning after the issuance and service of the attachment.

The new affidavit and garnishment filed in the Federal Court made no reference to any state of facts that existed except as of January 23, 1936, when that affidavit was sworn to. The new affidavit did not purport to show that any state of facts existed in June of 1930 when the petition was filed in the state court, which would or could have warranted the issuance *then* of any attachment. Petitioner also attempted to attach and garnishee a fund of $17,756.05, *which was not in existence when the petition was filed in the state court.* In his new petition plaintiff changed the prayer to a prayer for judgment, "against said defendants *and each of them,*" thus attempting to change the suit from one asserting a joint liability to one asserting a joint and several liability and by his new attachment and garnishment proceedings he attempted to reach the separate property of each defendant, although, as hereinbefore shown, in the state court he had attempted to reach only the defendants' joint property.

The affidavit (R. 6) and the order of attachment (R. 9) in the state court attempted to deal only with

property of the defendants in Lucas County, Ohio, whereas the order of attachment issued by the District Court (R. 37) commands the marshal to attach the property of the defendants "in your district." The Northern District of Ohio includes many counties besides Lucas County. *The Court of Common Pleas could not have issued an attachment directing the sheriff of Lucas County to attach property in any place other than Lucas County.* Under Section 11,823 "Orders of attachment may be issued to the *sheriffs of different counties,*" but it is perfectly clear that an attachment issued to the sheriff of *Lucas County* could not be *amended* by commanding *him* as the sheriff of Lucas County to attach property in any and all counties lying within the Federal Northern Judicial District of Ohio. Thus the form of the attachment alone issued by the District Court is enough to establish that it was not and could not be an *amendment* of the order of attachment issued by the state court, but was a new and independent proceeding.

What plaintiff attempted to do under the guise of filing amended and supplemental pleadings and attachment proceedings was to file a new action asserting a different liability and seeking to reach property in part different from that in the state court proceedings and to reach it in territory outside of that covered by the state court writs. The claim of right to do this is based upon what we believe we have shown to be attempted proceedings in the state court which had completely failed to vest any jurisdiction in that court.

Aside from the question of Federal law involved, hereinafter discussed, petitioner could not have done what he attempted to do even had the case remained in

the state court. The district judge in so ruling, said in part:

> "The affidavits filed in the state court, in my opinion, could not be amended by the supplemental affidavit filed in this court. *Leavitt vs. Rosenberg*, 83 O. S. 230, 240, 241. In Ohio the syllabus is the law of the case, and the fourth syllabus of the above case is as follows:
>
> " 'The levy of the order of attachment, based upon an insufficient affidavit, cannot be upheld by an amendment of the affidavit'."

It has been contended by counsel for the petitioner that the Supreme Court of Ohio based its decision in the *Leavitt* case upon two grounds and that it, therefore, is not authority for the proposition contained in the fourth syllabus of the opinion quoted by the District Court in its opinion herein, but this is not the correct rule. This court said, in *United States vs. Title Insurance & Trust Company*, 265 U. S. 472:

> "* * * where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court and of *equal* validity with the other.' *Union Pacific R. R. Co. vs. Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160, 166; *Railroad Companies vs. Schutte*, 103 U. S. 118, 143." (P. 486.) (Italics ours.)

The *Leavitt* case, relied on by the lower court, followed the long settled and well established law in Ohio that an attachment or garnishment issued on an insufficient affidavit is *absolutely void* and can not be validated by any subsequent amendment.

In *Pope vs. Hibernia Ins. Co.*, 24 O. S. 481, the affidavit was defective in that it failed to show that the

cause of action was one arising upon contract, judgment or decree. The court held:

> "Jurisdiction cannot be acquired in such case, by amendment of the petition and affidavit, showing a cause of action arising upon contract, without the issuance of an attachment after the amendment." (Syl. 2.)

In *Endel vs. Leibrock*, 33 O. S. 254, the court held:

> "A writ of attachment under the code, without the requisite affidavit, is void.
>
> "The seizure of property of a non-resident debtor, upon whom service of summons can not be made on such void writ, does not give the court such jurisdiction over the defendant or his property as will authorize a service by publication, or a judgment in the action." (Syl. 1 and 2.)

As the question here involved is one of Ohio law, it seems unnecessary to discuss the decisions from other states. For the same reason, 28 U. S. C. A. Section 777, relied upon by counsel for petitioner (their brief pages 28, 40), has no application, for it specifically refers to "summons * * * return process * * * or other proceedings in civil causes in any court of the United States," whereas all of the proceedings we claim to be nonamendable were had in the Common Pleas Court of Lucas County, Ohio. Moreover, 28 U. S. C. A., Section 777, refers to defects "in form," whereas, under the decisions of the Supreme Court of Ohio, *supra*, a valid affidavit is a jurisdictional requisite to proceedings in attachment and garnishment, and, hence, a defect therein is a *jurisdictional* defect and not merely one of form. Cases such as those cited at page 40 of petitioner's brief which deal with actions in admiralty or which were *orig-*

inally commenced in the District Court of the United States, wherein *personal service* had been made upon the defendants, are not in point, as the jurisdiction of the court there is acquired as a result of personal service and the attachment is a mere incident to the action. In our case a valid attachment is the essential prerequisite upon which the jurisdiction of the court depends.

As stated by the Supreme Court in *Pennoyer vs. Neff*, 95 U. S. 714:

> "* * * the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. * * *" (P. 728.)

In other words, in an attachment under the state practice of Ohio, the first inquiry must be, have the requisite steps been taken to give the court jurisdiction over some property of the defendant? If not, there is nothing before the court on which it can exercise jurisdiction. *A nullity can not be amended.*

> "* * * where the jurisdiction is dependent upon the order of attachment accompanying the summons, the attachment having failed, it follows that the jurisdiction upon the merits must also fail.
>
> "6 Corpus Juris, 465, says:
>
> " 'Where, however, a suit is commenced by attachment, and the attachment is essential to the jurisdiction of the court, the dissolution of the attachment will carry with it the main suit'."
>
> *Adams vs. Lumber Company*, 117 O. S. 298, 303. (1927).

In *Bear vs. Old Tyme Distilleries, Inc.*, 6 O. O. 253, the plaintiff attempted to secure an attachment after a previous attachment had been discharged. The journal entry of the court states in part:

"This court finds that said action was a proceeding *in rem* and that *the attachment of the property of the defendant therein was essential to the jurisdiction of the court and that therefore the dissolution of the attachment carried with it the dismissal of the main suit,* and that the order should have included the dismissal of said petition." (P. 253.) (Italics ours.)

In this case the jurisdiction of the court below on removal obviously could be no greater than the jurisdiction of the Court of Common Pleas would have been if the case had remained there. Had the case not been removed the attempted amendment would not have been effective to breathe life into the abortive attachment proceedings had some six years earlier. Having been removed the attempted amendment was no more effective than it would have been in the state court. It seems clear that a statute expressly attempting to make such an amendment effective would be invalid. But there is no such statute. On the contrary, as held by the courts below, in Federal courts an attachment is not permitted without personal service upon the defendant. The attempted amendment was, therefore, completely ineffectual under the state or the federal law. We, therefore, submit that the proceedings attempted in Federal Court, although planted there under the guise of amended and supplemental proceedings, must in law be regarded as an attempt to start a new and different action in the Federal Court, which was wholly ineffective in that court, and would have been wholly ineffective had the amended pleadings been filed prior to removal in the state court, to validate the abortive attachments and garnishments under the defective state court affidavits.

(2) THE ATTEMPTED ATTACHMENT BY PROCESS OF THE FEDERAL COURT WAS WHOLLY INEFFECTIVE BECAUSE THE STATE STATUTES DO NOT PROVIDE FOR OR PERMIT AN ALIAS WRIT OF ATTACHMENT.

The plaintiff's entire argument, that not permitting an attachment to be issued out of the federal court in this case makes the procedure in the federal court different from that in the state court, proceeds upon the erroneous hypothesis that the plaintiff could have issued a second order of attachment and a second notice to garnishees, had the case remained in the state court without starting his proceedings all over again.

In other words, the plaintiff erroneously contends that had the case remained in the state court, he could have amended his original attachment proceedings by having issued an alias order of attachment and notice to garnishees.

In addition to the other reasons pointed out in this brief why petitioner's claim is wrong, it is our contention that the statutes of Ohio do not authorize the issuance of a second or alias order of attachment and notice to garnishees to be issued to the sheriff of the *same* county who received the prior order of attachment and notice to garnishees.

The only references in the Ohio General Code to two or more orders of attachment are the following sections:

Section 11,823:

> "Orders of attachment *may be issued to the sheriffs of different counties.* Several of them at the option of the plaintiff, may be issued at the same time or in succession. But such only as have

been executed shall be taxed in the costs, unless otherwise directed by the court. (R. S. §5525.)" (Italics ours.)

Section 11,825:

"When there are several orders of attachment against the same defendant, *they shall be executed in the order in which they were received by the sheriff.* (R. S. §5527.)" (Italics ours.)

Section 11,835:

"When the property is under attachment, attachments thereon under subsequent orders must be as follows:

"1. If it is real property, it shall be attached in the manner prescribed for executing attachment;

"2. If it is personal property, it shall be attached as in the hands of the officer, *and be subject to any previous attachment;*

"3. If a person be made a garnishee more than once with respect to the same indebtedness or liability, a copy of the order and notice shall be left with him in the manner prescribed for serving a garnishee. (R. S. §5536.)" (Italics ours.)

The latter two sections obviously refer to orders of attachment or notice to garnishees issued on behalf of *different* plaintiffs against property of the same defendant, for General Code Section 11,825 provides the priority which successive attachments shall have. The matter of priority as between different attachments would become important only where the attachments were made on behalf of different individuals. Hence that section clearly furnishes no basis for a claim that more than one attachment or garnishment against the same defendant on behalf of the same plaintiff is authorized by the Ohio statutes. Likewise, Section 11,835 furnishes no basis for

any such contention, because it relates principally to the procedure to be followed in successive attachments by different plaintiffs, and numbered paragraph 2 of that section clearly shows that the situation referred to is one in which different plaintiffs have secured successive attachments, for that paragraph, like Section 11,825, fixed the priorities of successive attachments which, as pointed out, would have no importance if the attachments were by the same plaintiff.

The only statute relating to more than one attachment *by the same plaintiff against the same defendant* is Section 11,823 providing that such orders may be issued "to the sheriffs of *different* counties." Under the familiar maxim of statutory interpretation, Section 11,823 excludes the possibility of issuing several orders to the sheriff of the *same* county. That rule of interpretation is clearly stated in *Cincinnati vs. Roettinger,* 105 O. S. 145, where the court said at page 152:

> "* * * For the purpose of determining the legislative intent the maxim *expressio unius est exclusio alterius* has direct application. That maxim has peculiar application to any statute which in terms limits a thing to be done in a particular form, and in such case it necessarily implies that the thing shall not be done otherwise. That maxim finds its chief use as an aid in ascertaining the whole scope of a law. * * *"

It should be further pointed out that all the other statutory provisions relating to orders of attachment and notice to garnishees simply refer to a *single order or notice.* Thus, Ohio General Code, Section 11,819, provides that under certain conditions

> "* * * the plaintiff may have *an attachment.* * * *"

Ohio General Code, Section 11,820, provides:

> "*An* order of attachment shall be made * * * *when* there is filed * * * an affidavit of the plaintiff. * * *" (Italics ours.)

Ohio General Code, Section 11,821, refers twice to "the attachment" and twice to "*the* order."

Ohio General Code, Section 11,822, refers to "*the* order," which shall set forth the amount of the plaintiff's claim "to be stated in the order as in the affidavit."

Ohio General Code, Section 11,824, refers to "*the* order" and sets the return day depending upon when "it" has issued.

Ohio General Code, Section 11,828, provides that "*when* the plaintiff" makes a proper affidavit, the sheriff must serve garnishees with *a* written notice and a copy of *the* order of attachment.

One of the leading cases holding that a second order of attachment, under statutes similar to those in force in Ohio, is unauthorized is *Crary vs. Dye*, 208 U. S. 515, where, in affirming the Supreme Court of the Territory of New Mexico, it was said:

> "1. The statutes of the territory distinguish between original and ancillary attachments. Sections 2686 and 2721 of the Compiled Laws of New Mexico. There is no provision for an alias attachment, and it was hence concluded by the Supreme Court of the territory that an alias attachment was not authorized, and that a judgment dependent thereon was void and could be attacked collaterally. The procedure in attachment is provided for in Chapter II of the Compiled Laws of New Mexico, §§2686 to 2737, both inclusive. A summary of the applicable sections is inserted in the margin.
>
> "There is no provision for an alias attachment,

and we think the implication of the statute is against it, certainly against it except upon filing a new affidavit and bond and a new publication of notice * * *." (Pp. 516, 517).

The opinion in the same case of the Supreme Court of the Territory of New Mexico is reported as *Dye vs. Crary.* (New Mex., 1904) 78 Pac. 533. That court said:

"* * * The legislature has undertaken to give us an attachment procedure. Comp. Laws 1897, §§2686 to 2736, inclusive. *If alias writs of attachment are not authorized* by our statutes, then they cannot issue. * * * The ground for the attachment might exist when the bond was given and the original writ issued, but might not exist at the time of the issuance of an alias writ. For instance, the first ground of attachment provided for in the statute—non-residence—existing at the time of the issuance of the original writ might not exist at the time of the issuance of the alias writ, for the defendant, long before the issuance of the alias writ, might have become a resident of the territory, and, *if an alias writ of attachment can be issued at all, it can as well be issued one year after the issuing of the original writ as one day or one month thereafter.* * * * Attachment being in derogation of the common law, we must look to our statutes. If our statutes do not authorize the issuance of an alias writ of attachment, then one cannot be issued. Certainly, our statutes do not provide for an alias writ of attachment in express terms; nor, do we think, by implication." (Pp. 533, 534.) (Italics ours.)

As shown in the foregoing opinion and as set forth in the footnotes in the case in the Supreme Court of the United States, the statutes of New Mexico provide for "original writs of attachment," *i. e.*, cases begun by attachment, and for "ancillary writs of attachment," *i.e.*,

cases begun by service of summons upon the defendant. In Ohio both types of attachments are provided for in the same statutes by providing that an attachment may issue at or after the commencement of the action. Ohio General Code, Section 11,819.

It should be pointed out that the Compiled Laws of New Mexico, Sections 2696, 2697 and 2722, refer to writs of attachment in the plural. Notwithstanding this fact, the court held that an alias attachment could not issue. The Ohio statutes present an even stronger case for such a holding as they do not make any reference to more than a single writ in the same suit excepting in issuing writs to different counties.

The conclusion of the court in the *Dye* case, *supra*, that the requisite bond given for the issuance of an order of attachment would not cover damages caused by the issuance of an alias order is in point under Ohio General Code, Section 11,821, which, after providing that an attachment may issue without bond when the defendant is a foreign corporation and not a resident of the state, further provides:

> "* * * In all other cases *the order* shall not be issued by the clerk until a bond is executed in his office by sufficient surety of the plaintiff, to be approved by the clerk, in a sum equal to double the amount of the plaintiff's claim, to the effect that he will pay the defendant all damages which he may sustain by reason of *the attachment* if *the order* proves to have been wrongfully obtained." (Italics ours.)

The court said in the *Dye* case, *supra*:

> "* * * Could it be said that the bondsmen would be holden for damages for the wrongful suing out of the alias writ of attachment * * *?

> We think not. * * * The conditions of the parties might change very materially, and the bondsmen might not be willing under such changed conditions to stand sponsor for the damage that might result from the issuance of an alias or any other writ of attachment under the then existing circumstances. Yet, if an alias writ may issue, it must carry with it the obligations of the bondsmen; otherwise you have a writ of attachment without bond, which certainly cannot be contended. * * *" (P. 534.)

It follows that if an alias order of attachment cannot issue in cases where the original order of attachment required a bond, an alias order cannot issue in cases where no bond was required with the original order of attachment, as no distinction is made anywhere in the statutes.

Furthermore, the defendant may have his property released from attachment by giving bond *in double the amount of plaintiff's claim* (Sec. 11848). It seems clear that the statutes do not contemplate an alias attachment, as by this simple means the plaintiff could nullify the effect of such a bond and harass the defendant by repeated attachments.

The attachment laws of Illinois contain a provision similar to the Ohio statutes in regard to issuing orders of attachment to the sheriffs of different counties.

Starr & Curtis's Annotated Illinois Statutes, Second Edition, Vol. 1, Chapter 11, Sec. 13:

> "The creditor may, at the same time, or at any time before judgment, cause an attachment writ to be issued *to any other county* in the state where the debtor may have property liable to be attached, which shall be levied as other attachment writs: * * * (Italics ours.)

The leading case in Illinois is *American Trust & Savings Bank vs. Pack, Woods & Co.*, 70 Ill. App. 177, affirmed in *Pack, Woods & Co. vs. American Trust & Savings Bank*, (Illinois, 1898) 50 N. E. 326. In the opinion the Court of Appeals said:

> "This court has held in *Dennison vs. Blumenthal*, 37 Ill. App. 385 (affirmed by the Supreme Court under the title of *Dennison vs. Taylor*, 142 Ill. 45, upon another point, and without alluding to the point in question), that proceedings by attachment are in derogation of the common law, and can only exist and be carried on by virtue of some statutory provision, and that the statutes of this state make no provision for an alias writ in case of an original attachment; and such decision applies as well in the case of an attachment in aid, as in the case of an original attachment.
>
> "Secs. 31 and 33 of the attachment act require that proceedings in the cases of attachments in aid shall, as near as may be, conform to proceedings in cases of original attachments, and it follows that if no *alias* writ may issue in cases of original attachments, none may in cases of attachments in aid. *Crandall vs. Birge*, 61 Ill. App. 234.
>
> "But appellee contends that because nothing was done under the first writ except to return it unexecuted by order of plaintiff's attorney, it was a nullity, the same as if no writ had ever issued, and therefore the plaintiff had in reality but one writ of attachment in aid of his suit, *viz.*: the second writ, which therefore was not in any proper sense an *alias* writ. We can not assent to the correctness of such contention.
>
> • • • • •
>
> "An *alias* writ is a writ issued where one of the same kind has been issued before in the same cause.
>
> • • • • •
>
> "Nor could the fact that in the second writ there

was named a different garnishee from that named in the first writ, make the second writ an original writ." (Pp. 178, 179.)

In the opinion of the Supreme Court of Illinois the court said:

"The chief question presented by this record is, can a second attachment in aid be issued in the same suit after a return of the first writ unexecuted? * * * In the case at bar the suit was begun by the issuing of a summons. Then a writ of attachment in aid was regularly sued out and returned unexecuted, as was also the summons. There was nothing more done until two months later, when a new affidavit and bond were filed, and a new writ of attachment issued and served on defendant in error. Was this an alias writ? Plaintiff in error contends that it was not, as it was not issued on the first affidavit and bond, but on a new affidavit and bond. An alias writ is a second writ issued where one of the same kind has been issued before in the same cause, when the former writ has not produced its effect. Counsel for plaintiff in error probably filed the second affidavit and bond in view of the language used in the *Dennison* case, that the original bond does not cover damages caused by the wrongful issue of an alias writ. The second writ here in controversy does not contain the words, 'as we have formerly commanded you' ('*sicut alias praecepimus*'), from which the alias writ derives its name; but because of such omission was it any the less an alias writ? It was a second writ issued in the same cause, the first writ having failed to produce its effect; and the additional affidavit and bond, in the absence of statutory authority for a second attachment in aid, can no more be held to change it from an alias writ to an original writ than a praecipe for a second summons in the same cause can be held to call for an original summons, and not for an alias sum-

mons. This was a suit against Pack, Woods & Co., and no jurisdiction could be obtained over the corporation or its property unless by personal service, or by attachment or garnishment of some of its property. No jurisdiction was obtained by the first writ, and the second was an alias writ for the purpose of securing what the first writ had failed to accomplish. We find nothing in the statute authorizing the issuing of an alias writ of attachment. * * * No provision is made anywhere for more than one writ, except in Section 13, which provides that 'an attachment writ' may be issued to any other county in the state where the debtor may have property liable to be attached. It is contended, because Section 33 provides that 'upon the return of attachments issued in aid of actions pending,' etc., it is thereby implied, by the use of the word 'attachments,' that more than one writ of attachment may be issued; but the plural, 'attachments,' was evidently used to correspond with the plural, 'actions pending,' immediately following, and the whole section gives no countenance to the position contended for. *As the statute nowhere provides for more than one writ of attachment to the same county in the same suit*, we think the issuing of the alias writ was unauthorized, and no jurisdiction was obtained by the court by the service of the same on the garnishee. The motions to quash the writ should have been sustained. It was error to overrule them, and the Appellate Court decided correctly in so holding. * * *" (Pp. 327, 328) (Italics ours.)

An Ohio case which directly passes upon the impropriety of issuing a second order of attachment is *Bear vs. Old Tyme Distilleries, Inc.*, (August 17, 1936) 6 Ohio Opinions 253. After the first attempted order of attachment proved invalid because (as here) prematurely issued, the plaintiff filed an affidavit for service

by publication, had the notice published, and then issued another attachment. This second attachment was attacked by motion, defendant contending that the dismissal of the first attachment in effect disposed of the entire case since there was no authority for a second attachment under the Ohio statutes. The journal entry of the court was in part as follows:

> "This day this cause came on to be heard upon the motion of the defendant, Old Tyme Distilleries, Inc., filed February 7, 1936, to dismiss, quash and discharge the attachment heretofore issued herein and predicated upon an affidavit and attachment filed herein on the 10th day of January, 1936, and it appearing to the court that heretofore, to-wit, on February 21, 1935, a petition, affidavit for constructive service, affidavit for attachment and garnishment were filed, and an order of garnishment issued thereon, and that upon motion of defendant to quash said order of garnishment and attachment and upon hearing thereof, this court found that said order of attachment was invalid and sustained the motion of the defendant to quash and discharged said attachment.
>
> *"This court finds that said action was a proceeding in rem and that the attachment of the property of the defendant therein was essential to the jurisdiction of the court and that therefore the dissolution of the attachment carried with it the dismissal of the main suit, and that the order should have included the dismissal of said petition."* (P. 253.) (Italics ours.)

From the foregoing cases and authorities we respectfully submit that there is no provision in the statutes of Ohio authorizing the issuance of a second or alias writ of attachment or notice to garnishee to the sheriff of the same county, and that the plaintiff in our case could not

have issued orders and notices similar to those attempted to be issued by the federal court had this case remained in the Court of Common Pleas of Lucas County, Ohio. For this additional reason the decree of the lower court is correct and should be affirmed.

(3) THE ATTEMPTED ATTACHMENT BY PROCESS OF THE FEDERAL COURT WAS WHOLLY INEFFECTIVE BECAUSE OF FATAL DEFECTS IN THE NEW PROCEEDINGS, INCLUDING ISSUANCE OF THE ORDER OF ATTACHMENT PRIOR TO COMMENCEMENT OF THE ACTION.

We have hereinbefore shown that under the statutes of Ohio an attachment may issue only "at or after" the commencement of an action. See pages 18 to 32 hereof. In the state court proceedings petitioner *caused a summons to issue prior to the issuance of the order of attachment*, and contends under Section 11279, O. G. C., that this constituted the commencement of the action although the summons was not served. We believe we have shown that this is not correct, and that where the summons is not served, the action has not been commenced so as to permit the issuance of a valid order of attachment *until the first publication of notice has been made to the defendant*, as prescribed by Section 11230, O. G. C.

In the case of the proceedings in the District Court, however, whichever rule be applied, the record affirmatively shows that the order of attachment was prematurely issued.

The order of attachment was issued by the federal court on February 17, 1936. The summons was not issued by the federal court until April 4, 1936 (R. 86). The rec-

ord either shows no publication of notice to the defendant in the federal court, or if the record be supplemented by the stipulation we have offered to petitioner, then it shows that the first publication of notice to the defendant of the proceedings in the District Court was *February 19*, 1936.

Even if it be assumed, therefore (contrary to the law of Ohio), that if the proceedings had remained in the state court, further proceedings could have been had in the same action in that court, and even if it be assumed (contrary to the federal law as hereinafter shown) that the District Court had the same power to issue an order of attachment without personal service of summons that the state court had, nevertheless, it affirmatively appears that the petitioner did not obtain a valid attachment in the federal court, for the reason that *he caused it to be issued prior to instead of at or after the commencement of the action, even using petitioner's own definition as to what constitutes the commencement of an action.*

It is of interest in connection with the attempted attachment in the federal court to note the tacit admission by petitioner of the fatal errors and defects hereinbefore mentioned in the state court proceedings, which admission arises by the differences in the two proceedings, as well as by the fact that petitioner thought it necessary to file the second set of pleadings.

For example, the state court affidavit for attachment does not contain the statement that affiant "does believe" and contains no description of the property to be attached. The supplemental affidavit (R. 33) in attachment, filed in the federal court, states that affiant "does believe" and contains a description of the prop-

erty. The state court affidavit was verified before a notary not qualified. The supplemental affidavit in the District Court was notarized by a qualified notary. The sheriff's return in the state court did not state the names of the garnishee(s) or the time each was served, whereas the return of the marshal (R. 36) contains this information. The sheriff's return (R. 9) does not show service of the order of attachment on the garnishees but the marshal's return (R. 36) shows such service. The sheriff's return stated that he had found no property of the defendant. The marshal's return makes no such statement. The affidavit for attachment in the state court (R. 6) described the property to be attached as that of Devon Syndicate, Ltd., *and* Paris E. Singer, whereas the supplemental affidavit in the District Court (R. 33) seeks attachment of the property of Devon Syndicate, Limited, *and/or* Paris E. Singer.

Petitioner, however, did not have a correct order of attachment issued out of the District Court, as the property which the marshal was commanded to attach (R. 37) was that of "Devon Syndicate, Ltd., *and* Paris E. Singer *in your district,*" and it nowhere appears in its record that any jointly owned property was reached by the new attachment.

It seems quite clear that by making the above mentioned changes in the attempted proceedings in the District Court petitioner was admitting and seeking to eliminate the defects which defendant had pointed out to him in the state court proceedings, and was again attempting to commence the action but *again failed to do so at or before the issuance of the order of attachment.*

(4) THE ATTEMPTED ATTACHMENT BY PROCESS OF THE FEDERAL COURT WAS WHOLLY INEFFECTIVE BECAUSE THERE HAD BEEN NO PERSONAL SERVICE OF PROCESS UPON THE DEFENDANT IN THAT COURT OR IN THE STATE COURT, AS IS REQUIRED TO SUSTAIN A WRIT OF ATTACHMENT ISSUED BY A FEDERAL COURT.

We believe what has been said in the next preceding section hereof demonstrates that the filing of the amended and supplemental petition and amended and supplemental affidavit for attachment in the District Court can not be considered as an amendment of the void proceedings which had been removed from the state court, but was the equivalent of an attempt to commence a new action in the District Court. If so regarded it falls squarely within the decision by this court in *Big Vein Coal Company of West Virginia vs. Read*, 229 U. S. 31, to the effect that a valid order of attachment can not be issued by a federal court in the absence of personal service upon or voluntary appearance of the defendant in the action.

Petitioner does not contest the correctness of the decision of this court in *Big Vein Coal Company of West Virginia vs. Read*, but contends that a different rule should apply in a case removed to the federal court than the rule applicable in the case of an action commenced in the federal court. Petitioner claims that because Section 28, U. S. C. A. 79 (Section 36, Judicial Code) (Appendix page 91), preserves in removed cases all *valid* attachments actually made before removal, and 28 U.

S. C. A. 81 (Section 38, Judicial Code) (Appendix page 91), provides that the District Court shall proceed as if the suit had been commenced in the District Court, and, thus, under 28 U. S. C. A., Sections 724 to 726 (Appendix page 93), an action commenced in the federal court would follow state practice to the extent provided by those sections, that upon removal of a cause to the federal court that court may issue a valid attachment without personal service of process *even though the state court proceedings are void and vested no jurisdiction of any property in either the state or the federal courts.*

We have hereinbefore shown, pages 54 to 58, that there can not be an amendment in the state courts of Ohio of *void* attachment proceedings. From this it necessarily follows, even under petitioner's argument, that the federal court following the state court practice can not authorize an amendment of a void attachment.

Petitioner's brief makes it entirely clear that what petitioner is seeking to do is to relate his attempted attachment in federal court back to the date of the filing of the petition in the state court about six years earlier, and to have it held that a lien arose by virtue of the federal court attachment, not as of the date it was issued or served, but as of the date some six years earlier of the issuance and service of the *void* state court attachment.

No one contends that petitioner could not have started new proceedings in attachment in the state court, which, if properly commenced and carried forward, would have resulted in a valid attachment lien upon such property of the defendants as might have been reached by such new proceedings. Such new proceedings could be,

by the filing of a new petition under a new docket number, and the filing of a proper affidavit for attachment and proper publication of notice and issuance, service and return of order of attachment, or they might possibly have gone forward in the state court (on the theory *disapproved* in *American Trust and Savings Bank vs. Pack, Woods & Company, supra*, pages 66 to 68, that everything which had been done therein was a nullity except the filing of the petition), by filing a new and proper affidavit for attachment under the old docket number without filing any new petition, and by having proper publication of notice and issuance, service and return of a new order of attachment therein. This might be regarded as the equivalent of the commencement of a new action under which plaintiff's rights would arise, not as of the date of the filing of the petition, but as of the time he completed doing the things necessary to the commencement of an action and the issuance and service of a valid order of attachment. This is the procedure which seems to be suggested by the Supreme Court in the cases of *Leavitt vs. Rosenberg*, 83 O. S. 230, and *Pope vs. Hibernia Ins. Co.*, 24 O. S. 481, which are relied upon by petitioner. In the *Hillman* case Judge Westenhaver said (P. 203):

> "* * * He would have, it is true, a petition lodged in the clerk's office, with a number on the appearance docket of the court; *but each act and step required by law to begin an action would have to be commenced over again.* * * *" (Italics ours.)

But as above pointed out, this is not the position contended for by the petitioner here. He is contending here that what he did in the District Court was not

equivalent to the commencement of a new action but was a mere amendment of the state court proceedings and *should be treated as though the things which he did in the federal court in* 1936 *had been done by him in the state court in* 1930; and this although his 1936 affidavit referred to facts claimed to be existing in *1936 and made no reference to any state of facts existing in June, 1930.* Thus the right of any intervening transferees, execution creditors and holders of other liens arising during the six-year period are to be destroyed and the proceedings in federal court are to be given a *nunc pro tunc* effect in favor of plaintiff and against defendant. In order to reach this result, petitioner asks this court to hold that proceedings in the state court, which were void and gave that court no jurisdiction of any property, should be treated as having *some* vitality and as having created *some* jurisdiction over *something* so that the federal court may not be bound by the rule of the *Big Vein Coal Company* case and may issue an attachment without service of process and by engrafting it upon the void state court proceedings, give life to both.

We submit that merely to state this proposition is to demonstrate that it is untenable.

The principal argument advanced in support of this claim of the petitioner is that by repeated removal proceedings defendant "could prevent a plaintiff from ever securing an attachment in any action." This claim is a manifest absurdity. If a plaintiff follows the state court practice and actually gets his action commenced by the beginning of publication and has his attachment validly levied, it is expressly provided by 28 U. S. C. A., Section 79, that after removal proceedings

> "* * * any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. * * *"

There is no way by which a defendant even if he knew in advance that he was going to be sued and had his removal papers all ready, could remove in time to prevent commencement of the action in state court, if the plaintiff proceeds according to law.

It is true that if *the petitioner has failed to commence his state court proceedings in accordance with the state law* and the case is one in which personal service can not be obtained, he can not rely upon such void state court proceedings as the basis for amendment in federal court, but must start new proceedings in the state court. The only difference, if any, between his position where such a void proceeding has been removed and his position where it has not been removed is that in the former case he would certainly have to file a new petition in the state court, whereas in the latter case it may be that he could rely upon his old petition, providing he took all other steps anew. In either event, his rights would be the same, his lien would attach in the new proceedings at the same time, and in neither case would such lien relate back to the void original attachment. It thus will be seen that petitioner's whole argument based on the supposed *practical necessity* of a ruling in favor of his contentions, is without foundation and that no reason exists for applying any different rule permitting amend-

ment of an attachment, *which is the basis of jurisdiction,* in federal court in a removal case, than in a case originally filed in the federal court.

As we understand them, the rationale of such cases as *Big Vein Coal Company of West Virginia vs. Read,* 229 U. S. 31, and *Ubarri vs. Laborde,* 214 U. S. 168, and like decisions, which hold that an attachment may not issue out of a federal court unless personal service has been had upon the defendant, is that attachment is an auxiliary remedy which is "but an incident to the suit, and unless the suit can be maintained through jurisdiction properly obtained, the attachment must fail." A removed attachment suit in which there has been no personal service of summons is manifestly one in which there is no jurisdiction unless the attachment in the state court is *valid.* When, as here, it is *invalid,* it follows that as the suit can *not* "be maintained through jurisdiction properly obtained the 'federal' attachment must fail."

In view of the complaint by petitioner that the removal proceeding results in his being deprived of a procedural right which he would have if the case were not removed (namely, the right to have a new attachment issue upon taking the steps prescribed by law for an original attachment in state court), it is, we believe, pertinent to point out that the statutory right of removal is not conditioned upon the preservation to the plaintiff of the exact procedural rights appertaining to the state court from which removal is had. Federal power over procedure is undoubted.

Wayman vs. Southard, 10 Wheaton 1;
Erie Railroad Co. vs. Tompkins, 304 U. S. 64, 92.

Numerous examples may be found in the reported cases of differences in a removal cause between the procedural rights of the parties before and after removal. Among them are the following:

Ex Parte Fisk, 113 U. S. 713; (Examination of party in advance of trial permitted in state court denied after removal.)

Potter vs. National Bank, 102 U. S. 163; (Witness and testimony incompetent under state law. Competent and admissible after removal.) and

King vs. Worthington, 104 U. S. 44;

Employers Corp. vs. Bryant, 299 U. S. 374; (Cause remanded because personal service could not be obtained upon defendant within district, although defendant could have been reached by process of state court in the absence of removal.)

Petitioner argues that Congress has, by Sections 724 and 726 of 28 U. S. C. A., preserved upon *removal* the same initial procedural rights by way of attachment that plaintiff had in the state court, but petitioner concedes that these sections of the statutes do not give a plaintiff who *starts* his action in the federal court the same initial procedural rights which he would have in the state court. Petitioner *must* make this last concession in view of *Big Vein Coal Company* case and like cases. Petitioner thus says that these sections of the statute should be read as though they differentiated between removed causes and causes initially begun in the federal court, *but none of*

these sections makes any such distinction. Whatever Sections 724 and 726 provide for, they provide for equally, whether the cause be begun in or removed to the federal court. In the *Big Vein Coal Company* case the court specifically rejected the argument that by reason of Section 726 an attachment might issue out of the federal court without the necessity of personal service being had. Section 79 merely preserves after removal whatever rights may have been obtained by valid attachment in a state court.

Sections 81 and 83 of 28 U. S. C. A. (Judicial Code §§38, 39) are, we submit, decisive of the present question. Section 81 provides that after removal, suits shall proceed as if they

> "* * * had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal,"

and that the District Court shall

> "* * * proceed therein as if the suit had been originally commenced in said district court, * * *."

Obviously this means the District Court in this case was bound by the rule of the *Big Vein Coal Company* case, *supra*, and had no power to issue an attachment in the absence of personal service on the defendant. Furthermore, the state court process being defective, the only authority the District Court had to complete such process was under Section 83:

> "* * * in the same manner as in cases which are originally filed in such United States court. * * *"

This again brings us back to the rule established by the *Big Vein Coal Company* case and similar cases. The clear and precise provisions of Sections 81 and 83 are no doubt the reason for the paucity of judicial authority to the contrary of petitioner's claims herein.

It is clear under the statutes and decisions, that the true rule as to the power of the Federal Court to proceed, by amendment if necessary, in removed attachment proceedings, in the absence of personal service is as follows:

If the action in the state court has been properly commenced and steps to attach property have been begun in such a way that if carried to completion in the state court before removal, jurisdiction of property would have been obtained by the state court, the attachment proceedings may be completed in the Federal Court after removal, and amendment of non-jurisdictional defects may be made. But if the action has not been properly commenced in the state court, or the proceedings for attachment begun therein are defective so that if carried to completion in the state court prior to removal, no jurisdiction of property would have been obtained, or if there are jurisdictional defects in the proceedings, in any of these events the Federal Court (personal service still not having been obtained) has no power to do anything other than to dismiss the entire proceedings.

We therefore respectfully submit that the courts below were right in their decision on this question for the reasons stated in their opinions (R. 49, 50, 96 to 98).

(5) PETITIONER ABANDONED THE PROCEEDINGS IN THE STATE COURT BY FILING THE NEW PETITION AND NEW AFFIDAVIT FOR ATTACHMENT, HAVING A NEW SUMMONS AND NEW ORDER OF ATTACHMENT ISSUE, AND MAKING A SECOND PUBLICATION OF NOTICE IN THE UNITED STATES DISTRICT COURT NEARLY SIX YEARS AFTER THE PETITION WAS ORIGINALLY FILED IN THE STATE COURT, AND THEN WHOLLY ABANDONED ALL PROCEEDINGS HEREIN IN BOTH FEDERAL AND STATE COURTS BY FILING AN ENTIRELY NEW PETITION AND ATTEMPTING TO SUE OUT AN ENTIRELY NEW ATTACHMENT IN THE STATE COURT ON JULY 13, 1936.

The general rule is that a repetition, such as occurred in this case, of some act or proceeding attempted to have been taken at a prior state of the proceeding is an election to abandon the former and to rely on the latter.

Ungerleider vs. Ewers, Recr. of Levering Bros., 20 O. A. 79-87;
Raymond vs. The T., St. L. & K. C. R. R. Company et al., 57 O. S. 271.

This rule was applied to a second writ of attachment by the Supreme Court of Louisiana in *Smith vs. Wilson*, 128 So. 682 (1930). In that case the sheriff, after serving the first writ, lost it, and made no return, and a second writ was issued without any amendment of the other proceedings and the property was again seized under the second writ. Subsequent proceedings were based on the second writ. The court said:

"* * * while it must be conceded that the loss of the originals of such instruments did not require that plaintiff should begin the proceedings anew and have the property again seized and process served, *the record shows that plaintiff elected to take such course rather than to have duplicates of the instruments issued, and plaintiff must be held to have abandoned the original attachment and proceedings thereunder;* * * * *Erwin vs. Bank*, 3 La. Ann. 186, 48 Am. Dec. 447; *Pugh vs. Flannery, supra.*" (P. 683.) (Italics ours.)

The complete repetition in the District Court of all of the prior proceedings was, we respectfully submit, an abandonment of such prior proceedings. The fact that the repetition was unavailing does not change its effect as an abandonment of the earlier proceedings. See *Smith vs. Wilson, supra*, in which the second attachment as well as the first was held void.

In addition to abandoning the state court proceedings in the manner just stated, however, the petitioner further abandoned the entire proceedings in both the state and federal court in this case by filing a new petition asserting the same claims and seeking to attach the same property in the Court of Common Pleas. The petition in this new action was filed in that court on July 13, 1936, two days after the entry of the judgment of dismissal in the present case by the District Court on July 11, 1936.

Respondent filed in the Circuit Court of Appeals a motion to dismiss the appeal on the ground that it had been abandoned and had become moot by the filing of this new suit and supported the motion by certified copies of the record of the state court in the new suit. The petitioner, in making up the record for this court, failed

to include therein, "Respondent's motion to dismiss appeal, notice thereof and certified copies in support thereof" so filed in and submitted to the Circuit Court of Appeals. Petitioner has declined to stipulate that the motion to dismiss and supporting papers may be deemed to be part of the record before this court. We have, therefore, printed them in a separate volume as Appendix C to this brief, and respectfully request that they be considered by this court and, if necessary, that this brief be treated as a motion suggesting a diminution of the record and that an order may be entered making the motion and supporting papers a part of the record.

There are numerous cases supporting our contention that the filing of a second suit upon the same cause of action is an abandonment of the appeal and an acquiescence in the decision of the lower court in the first case, particularly where, as in this case, the position taken by the plaintiff in the second case is inconsistent with the position sought to be maintained by him in the first case.

In *Morrison et al. vs. Bernot*, 108 Pac. 772 (Wash., 1910), the Supreme Court of Washington said:

> "* * * the appellant was at liberty to prosecute an appeal from the judgment of dismissal, or to prosecute a new action for the same cause, but manifestly he could not do both, for the rule is well established that, if a party after judgment against him, prosecutes another action based upon the same cause, he thereby estops himself to appeal from the first judgment or bring error to review it. *Carr vs. Casey*, 20 Ill. 637; *Gordon vs. Ellison*, 9 Iowa 317, 74 Am. Dec. 353; *Liebuck vs. Stahle*, 66 Iowa 749, 24 N. W. 562; *Ehrman vs. Astoria R. Co.*, 26 Or. 377, 38 Pac. 306. Inasmuch

as the appellant has waived his right of appeal from the first judgment, or is estopped to further prosecute it, such appeal must be dismissed." (P. 773, 774.)

In *Ault vs. Gill,* 14 Ky. L. R. 525 (1893), the abstract opinion by the court is as follows:

"* * * A landlord, by instituting an action to recover rent, abandoned his right to prosecute an appeal which had been granted him from an order discharging an attachment for the same rent, and, therefore, the court properly refused to permit the papers in the attachment proceedings to be read to the jury in support of the defendant's plea that another suit for the same cause of action was pending on appeal." (P. 525.)

In *Carr, Administrator, vs. Casey,* 20 Ill. 637 (1858), the court said:

"* * * By filing another bill for the same cause of complaint, the complainant acquiesced in and approved of the decree abating the former suit. While that suit is pending in the Circuit Court, and he is there calling upon the defendant to answer the matters complained of, he shall not be at liberty also to bring him into this court to defend the decree by which alone the complainant was placed in a position authorizing him to file the bill now pending. The demurrer must be overruled and the writ of error abated." (P. 638.)

In *Petersen vs. Strawn,* 192 N. W. 250 (Iowa, 1923), the court said:

"* * * It is quite clear that appellant has no right to further prosecute the appeal. He may not have two suits pending in the courts for the same thing at the same time. The proceedings taken by him after the first trial, and from which this appeal

is taken, is in the nature of an abatement, or an abandonment of his right to appeal. * * *" (P. 251.)

In *Buckley, et al., vs. Kelly, et al.*, 257 Pac. 1107 (Okla., 1927), the syllabus by the court is as follows:

"Where a party after his appeal to this court causes an action to be instituted in the United States District Court, involving the same parties and the identical subject matter, the filing of such action in the latter court will be deemed to be an abandonment of the appeal in this court, and on proper motion the appeal will be dismissed."

See also to the same effect:

Holland vs. Commercial Bank et al., 36 N. W. 112 (Neb., 1888);
Wright, Barrett & Stilwell Co. vs. Robinson, 82 N. W. 632 (Minn., 1900);
Ehrman vs. Astoria & P. Ry. Co. et al., 38 Pac. 306 (Ore., 1894).

Under the law of Ohio a valid garnishment amounts to an assignment to the attaching creditor of the indebtedness garnisheed in so far as is necessary to satisfy his claim, which assignment is effective as of the date the attachment and garnishment were made.

Alsdorf vs. Reed, 45 O. S. 653;
Secor vs. Witter, 39 O. S. 218.

In the case at bar petitioner is contending that he obtained an attachment and garnishment of certain property of the defendants in June of 1930, and, hence, that under the Ohio decisions, just cited, he had, in law, an

assignment of that property to him effective from and after June, 1930. In the second suit filed by petitioner in the Court of Common Pleas on July 12, 1936, and the accompanying proceedings for attachment, he asserted that the garnishees held, as property of Devon Syndicate, Limited, the identical property which, in this case, he is contending had passed to him in June of 1930 by legal assignment resulting from the first garnishment proceedings. By making the assertion in the second case that the property in question is the property of the defendant, Devon Syndicate, Limited, he necessarily abandoned his claim that title had in law passed to him some six years earlier, as a result of the first attachment proceedings.

It thus appears that without waiting for action of the reviewing courts in the case at bar the petitioner has taken steps to protect his claims by a new action based on the theory that he acquired no right in and to the property here involved by his first proceedings. In short, as a basis of his new action he necessarily accepted the proposition that the judgment of the District Court discharging his attachments and dismissing his petition in this case is *not* erroneous. He, therefore, can not now be heard to contend in this court that that judgment *is* erroneous.

Under the rules of law enforced by the courts in the decisions hereinbefore cited, we submit it is clear that petitioner's appeal to the Circuit Court of Appeals had become moot and that the motion to dismiss it should have been sustained. That court took no action, either way, with respect to the motion to dismiss, as it disposed of the case, as shown by its opinion, on other grounds.

CONCLUSION

For the reasons hereinbefore set forth we respectfully submit that the judgments of the courts below were right and should be affirmed.

Respectfully submitted,

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APPENDIX A

NOTICE IN THE TOLEDO LEGAL NEWS, WEDNESDAY, FEBRUARY 19, 1936

"In the District Court of the United States for the Northern District of Ohio, Western Division

No. 3711 at Law

"Horton C. Rorick, Plaintiff,

vs.

Devon Syndicate, Limited, and Paris E. Singer, Defendants.

"Devon Syndicate, Limited, also sometimes known as Devon Syndicate, Ltd., a foreign corporation, organized and existing under the laws of the Dominion of Canada, the last known address of its principal office and place of business being the Transportation Building, in the City of Montreal, Province of Quebec, Dominion of Canada, will take notice that on the 17th day of February, 1936, the plaintiff, Horton C. Rorick, filed his amended and supplemental petition against it in the District Court of the United States, for the Northern District of Ohio, Western Division, the same being Cause No. 3711 at Law, for the procurement by plaintiff against said defendant of a judgment for services rendered, based upon contract, all of which is more fully set forth in plaintiff's petition, together with his supplementary affidavit in garnishment on which said affidavit, orders of attachment and notices to garnishees have been issued by the clerk of said court and served on The Spitzer-

Rorick Trust & Savings Bank, Toledo, Ohio; The Spitzer-Rorick Trust & Savings Bank and Horton C. Rorick, Trustees, Toledo, Ohio; Horton C. Rorick, Toledo, Ohio; Everglades Club Company, Toledo, Ohio; and Blue Heron Land Company, Toledo, Ohio; attaching such moneys, property and assets of defendant, Devon Syndicate, Limited, and/or defendant, Paris E. Singer, in their possession and control, due and payable, or to become due and payable, to either one or both of said defendants, said moneys, property and assets being more particularly described in said supplemental affidavit in garnishment. Said garnishees are required to file their answers herein on or before the 11th day of April, 1936.

The prayer of said petition is for a decree sustaining said order of attachment and garnishment, and for judgment in favor of plaintiff and against said defendants, Devon Syndicate, Limited, and Paris E. Singer, and each of them, in the sum of Four Hundred Thousand Dollars ($400,000) with interest thereon at the rate of six per cent (6%) per annum from the 12th day of June, 1930, and for costs of suit.

Said defendant is required to answer said petition on or before the 11th day of April, 1936, or judgment and decree will be taken against it.

Horton C. Rorick, Plaintiff,

By Fraser, Effler, Shumaker & Winn,

His Attorneys.

Toledo, Ohio, February 18, 1936. 2-19 3-25 6wed"

APPENDIX B

UNITED STATES STATUTES

28 U. S. C. A., Section 79, (Judicial Code, Section 36):

"When an suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed. (R. S. §646; Mar. 3, 1875, c. 137, §4, 18 Stat. 471; Mar. 3, 1911, c. 231, § 36, 36 Stat. 1098.)"

28 U. S. C. A., Section 81, (Judicial Code, Section 38):

"The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal. (Mar. 3, 1875, c. 137, §6, 18 Stat. 472; Mar. 3, 1911, c. 231, §38, 36 Stat. 1098.)"

28 U. S. C. A., Section 82 (Judicial Code, Section 39):

"In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than $1,000, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid. (Mar. 3, 1875, c. 137, §7, 18 Stat. 472; Mar. 3, 1911, c. 231, §39, 36 Stat. 1099.)"

28 U. S. C. A., Section 83:

"In all cases removed from any State court to any United States court for trial in which any one or more of the defendants has not been served with process or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such process may be completed by the United States court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of such United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in such United States court. Nothing in this section shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause to the State court, the same as if process had been served upon him prior to such removal. (Apr. 16, 1920, c. 146, 41 Stat. 554.)"

28 U. S. C. A., Section 724:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding. (R. S. §914.)"

28 U. S. C. A., Section 726:

"In common-law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which were on June 1, 1872, provided by the laws of the State in which such court is held for the courts thereof; and such dis-

trict courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy. (R. S. §915.)"

28 U. S. C. A., Section 777:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe. (R. S. §954.)"

OHIO STATUTES

Bates Annotated Ohio Statutes, Fourth Edition, Section 4987:

"An action shall be deemed commenced, within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him; and when service by publication is proper, the action shall be

deemed commenced at the date of the first publication, if the publication be regularly made. (51 v. 57, §20; S. & C. 949.)"

Section 4988:

"An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, when the party diligently endeavors to procure a service; but such attempt must be followed by service within sixty days. And if the defendant is a corporation, whether foreign or created under the laws of this state, and whether the charter thereof prescribes the manner and place, or either, of service of process thereon, and such corporation passes into the hands of a receiver before the expiration of said sixty days, then service following such attempt to commence the action may, within said sixty days, be made upon such receiver, or his cashier, treasurer, secretary, clerk or managing agent, or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such agents or officers of such receiver with the person having charge thereof; and if such corporation is a railroad company, summons may be served upon any regular ticket or freight agent of said receiver, and if there is no such agent, then upon any conductor of said receiver, in any county in the state in which such railroad is located, and the summons shall be returned as if served upon said defendant. 91 v. 72; 51 v. 57, §20; S. & C. 949.)"

Section 5537:

"The officer shall return upon every order of attachment what he has done under it, and the return must show the property attached, and the time it was attached; when garnishees are served, their names, and the time each was served, must be stated; and the officer shall return with the order all undertakings given under it. (51 v. 57, §204, S. & C. 1006.)"

Ohio General Code Section 121:

"Who are ineligible.—No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested. (R. S. §111.)"

Ohio General Code Section 11,218:

"Lapse of time a bar.—A civil action, unless a different limitation is prescribed by statute, can be commenced only within the period prescribed in this chapter. When interposed by proper plea by a party to an action mentioned in this chapter, lapse of time shall be a bar thereto as herein provided. (R. S. §§4976, 4979; ~~29 O. S. 245; 30 O. S. 184.~~)"

Ohio General Code Section 11,230:

"When commenced.—An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made. (R. S. §4987.)"

Ohio General Code Section 11,231:

"When action deemed commenced.—Within the meaning of this chapter, an attempt to commence an action shall be deemed to be equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt be followed by service within sixty days. (R. S. §4988.)"

Ohio General Code Section 11,279:

"Summons to issue on petition.—A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon. (R. S. §5032.)"

Ohio General Code Section 11,292:

"Service by publication.—Service may be made by publication in any of the following cases:

"1. In an action for the recovery of real property or of an estate or interest therein, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"2. In an action for the partition of real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"3. In an action to foreclose a mortgage or to enforce a lien or other incumbrance or charge on real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"4. In an action to compel the specific performance of a contract for the sale of real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"5. In an action to establish or set aside a will, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"6. In an action by an executor, administrator, guardian, or trustee seeking the direction of the court respecting the trust or property to be administered and, the rights of the parties in interest, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence can not be ascertained;

"8. In an action against a corporation organized under the laws of this state, which has failed to elect officers or to appoint an agent upon whom service of summons can be made, and which has no place of doing business in this state;

"9. In an action which relates to or the subject of which is real or personal property in this state, when the defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is not a resident of this state, or is a foreign corporation, or his place of residence can not be ascertained;

"10. In an action against an executor, administrator, or guardian who has given bond as such in this state, but at the time of the commencement of the action is not a resident of this state or his place of residence can not be ascertained;

"11. In an action or proceeding for a new trial or other relief after judgment, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"12. In an action where the defendant, being a resident of this state, has departed from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent;

"13. In a proceeding in error when the defendant has no attorney of record in this state and is not a resident of and absent from this state, or has left the state to avoid the service of a summons in error, or so conceals himself that it can not be served upon him. (R. S. §5045.)"

Ohio General Code Section 11,295:

"How publication made.—The publication must be made for six consecutive weeks, in a newspaper printed in the county where the petition is filed.

When made in a daily newspaper, one insertion a week shall be sufficient. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer. (R. S. §5047.)"

Ohio General Code Section 11,524:

"Before whom affidavit may be made.—An affidavit may be made in or out of this state before any person authorized to take depositions, and unless it is a verification of a pleading must be authenticitated in the same way as a deposition.

"Such affidavit may be made before any person authorized to administer oaths whether an attorney in the case or not (116 v. 369; R. S. §5264. Eff. Aug. 30, 1935.)"

Ohio General Code Section 11,532:

"Who can not take depositions.—The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding. (R. S. 5271.)"

Ohio General Code Section 11819:

"*Grounds of attachment.* In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

"1. Excepting foreign corporations which, by compliance with the law therefor, are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;

"2. Is not a resident of this state;

"3. Has absconded with the intent to defraud his creditors;

"4. Has left the county of his residence to avoid the service of a summons;

*This sentence added by amendment in 1935. First sentence constituted entire section in 1930.

"5. So conceals himself that a summons cannot be served upon him;

"6. Is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;

"7. Is about to convert his property in whole or part, into money for the purpose of placing it beyond the reach of his creditors;

"8. Has property or rights in action, which he conceals;

"9. Has assigned, removed, disposed of, or is about to dispose of, his property, in whole or part, with the intent to defraud, his creditors;

"10. Has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought; and

"11. That the claim is for work or labor, or for necessaries.

"An attachment shall not be granted on the ground that the defendant is a foreign corporation or not a resident of this state, for any claim other than a debt or demand, arising upon contract, judgment or decree, or for causing damage to property or death or personal injury by negligent or wrongful act. (109 v. 59; R. S. §5521.)"

Ohio General Code Section 11820:

"*Affidavit for order of attachment;* contents. An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the next preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing:

"1. The nature of the plaintiff's claim;

"2. That it is just;

"3. The amount which the affiant believes the plaintiff ought to recover; and

"4. The existence of any one of the grounds for an attachment enumerated in such section.

"Such affidavit may be made before any person

*This sentence added by amendment in 1935.

authorized to administer oaths whether an attorney in the case or not. (116 v. 369, R. S. §5522. Eff. Aug. 30, 1935.)"

Ohio General Code Section 11821:

"*When undertaking required.* When the ground of the attachment is that the defendant is a foreign corporation, or not a resident of this state, the order may be issued without a bond. In all other cases the order shall not be issued by the clerk until a bond is executed in his office, by sufficient surety of the plaintiff, to be approved by the clerk, in a sum equal to double the amount of the plaintiff's claim, to the effect that he will pay the defendant all damages which he may sustain by reason of the attachment if the order proves to have been wrongfully obtained. (R. S. §5523.)"

Ohio General Code Section 11822:

"*Order of attachment.* The order of attachment shall be directed and delivered to the sheriff, and require him to attach the lands, tenements, goods, chattels, stocks or interest in stocks, rights credits, money, and effects of the defendant, in his county, not exempt by law from being applied to the payment of plaintiff's claim, or so much thereof as will satisfy it, to be stated in the order as in the affidavit, and the probable costs of the action, not exceeding fifty dollars. (R. S. §5524.)"

Ohio General Code Section 11823:

"*Two or more attachments.* Orders of attachment may be issued to the sheriffs of different counties. Several of them, at the option of the plaintiff, may be issued at the same time or in succession. But such only as have been executed shall be taxed in the costs, unless otherwise directed by the court. (R. S. §5525.)"

Ohio General Code Section 11824:

"*When returnable.* The return day of the order of attachment, when it is issued at the commencement of the action, shall be the same as that of the summons. When issued afterward, it shall be twenty days after it issued. (R. S. §5526.)"

Ohio General Code Section 11825:

"*When several orders issue.* When there are several orders of attachment against the same defendant, they shall be executed in the order in which they were received by the sheriff. (R. S. §5527.)"

Ohio General Code Section 11828:

"*Service of garnishee.* When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served. (R. S. §5530.)"

Ohio General Code, Section 11833:

"*How garnishee served.*—If the garnishee is a person, a copy of the order and notice shall be served upon him personally, or left at his usual place of residence. When a partnership is garnisheed by its company name, they shall be left at its usual place of doing business, or with a member of such partnership; and if a corporation, with the president or other principal officer, or its sec-

retary, cashier or managing agent. If such corporation is a railroad company, the copies may be left with a regular ticket or freight agent thereof, in any county in which the railroad is located. (R. S. §5534.)"

Ohio General Code, Section 11835:

"*How subsequent attachments made.*—When the property is under attachment, attachments thereon under subsequent orders must be as follows:

"1. If it is real property, it shall be attached in the manner prescribed for executing attachment;

"2. If it is personal property, it shall be attached as in the hands of the officer, and be subject to any previous attachment;

"3. If a person be made a garnishee more than once with respect to the same indebtedness or liability, a copy of the order and notice shall be left with him in the manner prescribed for serving a garnishee. (R. S. §5536.)"

Ohio General Code, Section 11836:

"*Form of return.*—The officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached. When garnishees are served, their names, and the time each was served, must be stated. The officer shall return with the order all bonds given under it. (R. S. §5537.)"

Ohio General Code, Section 11837:

"*When property and garnishee bound.*—An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice herein-

before mentioned. But when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment. (R. S. §5538.)"

Ohio General Code, Section 11843:

"*How attached property disposed of.*—The court, or a judge thereof in vacation, may make proper orders for the preservation of property during the pendency of a suit, and direct a sale of it when, because of its perishable nature, or the cost of its keeping, that will be for the benefit of the parties. The sale must be public, after such advertisement as is prescribed for the sale of like property on execution, and be made in such manner, and terms of credit, with security, as, having regard to the probable duration of the action, the court or judge directs. The sheriff shall hold and pay over all proceeds of the sale collected by him, and all money received by him from garnishees, under the same requirements and responsibilities of himself and sureties as are provided in respect to money deposited in lieu of bail. (R. S. §5544.)"

Ohio General Code, Section 11848:

"*Garnishee may pay money into court or to sheriff.*—A garnishee may pay the money owing by him to the defendant, or so much thereof as the court orders, to the officer having the attachment, or into court. He shall be discharged from liability to the defendant for money so paid, not exceeding the plaintiff's claim, and shall not be subjected to costs beyond those caused by his resistance of the claims against him. If he discloses the property in his hands, or the true amount owing by him and delivers or pays it according to the order of the court, he shall be allowed his costs. When any part of the earnings of the debtor is not exempt, the garnishee process shall remain in force from the time of its service until the trial of the cause to determine the claim, debt or demand

of the creditor and bind all such earnings due at the time of service, and which become due from that time until the trial of such cause. But the garnishee may pay to the debtor an amount equal to ninety per cent of such personal earnings, due when the process is served or becoming due thereafter until trial, and be released from any liability to such creditor therefor. (R. S. §5548.)"

Ohio General Code, Section 11851:

"*Action against the garnishee.*—If the garnishee fails to appear and answer, or if he appears and answers, and his disclosure is not satisfactory to the plaintiff, or if he fails to comply with the order of the court to deliver the property and pay the money owing into court, or to give the bond required in the next preceding section, the plaintiff may proceed against him by civil action. Thereupon such proceedings may be had as in other actions. Judgment may be rendered in favor of the plaintiff for the amount of property and credits of the defendant in possession of the garnishee, for what may appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. (R. S. §5551.)"

Ohio General Code, Section 11853:

"*Judgment against garnishee.* Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined. If judgment be rendered therein for the defendant in attachment, the garnishee shall be discharged, and recover costs. If the plaintiff recovers, and the garnishee delivers up the property and credits of the defendant in his possession, and pays the money due from him, as the court orders, he must be discharged, and the costs of proceedings against him be paid out of the property and money so surrendered, or as the court deems right. (R. S. §5553.)"